

HEARING ON PROTECTING CONGRESS' POWER OF THE PURSE AND THE RULE OF LAW

HEARING BEFORE THE COMMITTEE ON THE BUDGET HOUSE OF REPRESENTATIVES ONE HUNDRED SIXTEENTH CONGRESS SECOND SESSION

HEARING HELD IN WASHINGTON, D.C., MARCH 11, 2020

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HEARING ON PROTECTING CONGRESS' POWER OF THE PURSE AND THE RULE OF LAW

WEDNESDAY, MARCH 11, 2020

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE BUDGET
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m. in room 210, Cannon House Office Building, Honorable John A. Yarmuth [Chairman of the Committee] presiding.

Present: Representatives Yarmuth, Moulton, Higgins, Boyle, Doggett, Schakowsky, Kildee, Panetta, Morelle, Horsford, Scott, Jayapal, Sires, Peters; Womack, Woodall, Johnson, Smith, Flores, Hern, Roy, Meuser, Crenshaw, and Burchett.

Chairman YARMUTH. The hearing will come to order.

Good morning, and welcome to the Budget Committee's hearing on Protecting Congress' Power of the Purse and the Rule of Law.

I want to welcome our witnesses here with us today. This morning we will be hearing from Professor Josh Chafetz, a Professor of Law at Cornell Law School, and Visiting Professor at the University of Texas at Austin School of Law; Professor Eloise Pasachoff, Associate Dean and Agnes N. Williams Research Professor at Georgetown Law; Mr. Thomas Armstrong, General Counsel of the U.S. Government Accountability Office; and Dr. Philip Joyce, Professor of Public Policy and Senior Associate Dean at the University of Maryland, School of Public Policy. Welcome to all of you.

I now yield myself five minutes for an opening statement. In Federalist 51, James Madison said that if we were governed by angels, "Neither external nor internal controls on government would be necessary."

Since that is not the case, our founders purposely embedded a structure of checks and balances into our Constitution to ensure a separation of powers. After fighting a war to rid themselves of a king, the core goal of our Constitution was to divide powers between the branches in order to prevent one branch from gaining dominance and creating a new monarchy.

The founders knew that money, and who controls it, is fundamentally important in a democratic government. They were adamant that Congress control the power of the purse since it can act as a critical check on the president, and because of the House's bi-annual elections for Members, it is the branch most accountable to the people.

Congress has carried out this constitutional responsibility to control spending by enacting foundational laws to prevent the executive branch from misspending; laws like the Antideficiency Act and the Empowerment Control Act.

But despite Congress' commitment to fulfilling its role, its ability to follow through and conduct oversight of executive spending has been increasingly challenged over time as presidents and agencies have sought to claim more control over spending. They have circumvented the law, ignored the law, and even broken the law, often without repercussions.

This threat to the American experiment transcends presidents, parties, or politics. And if defending our institution and the basic premise of our democracy is not reason enough to strengthen our laws, then I would point to the hundreds of millions of people impacted by executive misspending and overreach: the American people.

The erosion of our nation's separation of powers poses tangible and destructive impacts for constituents, states and localities, and the operation of government. Our communities count on the funds we appropriate whether it is disaster relief, infrastructure investments, improving our military bases and housing, or strengthening our education and healthcare systems.

The American people need to know that when their representatives in Congress pass an appropriations bill and it is signed into law, a structure is in place to ensure that money gets to the people who need it. That is why the growing lack of transparency about how the executive branch uses non-public apportionments to exert control over agencies' spending is a major problem.

Too often, this leaves the American people and our allies abroad wondering whether, when, and how they will get the support they need and were promised by Congress.

To help protect and enforce its spending decisions, Congress established the General Accountability Office, a nonpartisan legislative office charged with investigating and reporting on violations of budget and appropriations laws.

Since its inception, GAO has uncovered numerous instances of executive misspending and impoundment. But even this nonpartisan agency has faced executive stonewalling, underscoring the need for stronger laws that demand compliance.

For Congress to remain a coequal branch of government and fulfill its constitutional responsibility to control how the people's tax dollars are spent, we must reassert Congress' control over spending and ensure we are the ones holding the purse strings. Increasing transparency and accountability will enable Congress to provide the oversight of the executive branch that our founders intended.

We are holding this hearing at a time when there is a growing interest in strengthening our constitutional checks and balances; but our nation's separation of powers did not break down overnight. Decades of presidents and federal agencies testing the limits of their executive powers, a changing world that requires quick government action and access to resources, and an increasingly divided Congress more focused on what divides us than what can bring us together, have all exacerbated this clear and present threat to our democracy.

But recent and high-profile executive abuses of budget and appropriations laws, including withholding foreign aid, diverting domestic disaster relief, and reprogramming defense funds, have brought Congress' power of the purse into the spotlight; and as a result, the American people are demanding action.

Today we will have the opportunity to explore reforms that will help our government better serve the people and operate more like the democracy our founders envisioned. I look forward to what our expert witnesses have to say.

[The prepared statement of Chairman Yarmuth follows:]

Chairman John A. Yarmuth
Hearing on Protecting Congress’
Power of the Purse and the Rule of Law
Opening Statement
March 11, 2020

In Federalist 51, James Madison said that if we were governed by angels “neither external nor internal controls on government would be necessary.” Since that is not the case, our Founders purposefully embedded a structure of checks and balances into our Constitution to ensure a separation of powers. After fighting a war to rid themselves of a king, the core goal of our Constitution was to divide powers between the branches to prevent any one branch from gaining dominance and creating a new monarchy.

The Founders knew that money – and who controls it – is fundamentally important in a democratic government. They were adamant that Congress control the power of the purse since it can act as a critical check on the President and – because of the House’s bi-annual elections for members – it is the most accountable to the people.

Congress has carried out this constitutional responsibility to control spending by enacting foundational laws to prevent the executive branch from misspending – laws like the Anti-Deficiency Act and the Impoundment Control Act. But despite Congress’ commitment to fulfilling its role, its ability to follow through and conduct oversight of executive spending has been increasingly challenged. Over time, as Presidents and agencies seek to claim more control over spending, they have circumvented the law, ignored the law, and even broken the law. Often without repercussions.

This threat to the American experiment transcends presidents, parties, or politics. And if defending our institution and the basic premise of our democracy is not reason enough to strengthen our laws, then I would point to the hundreds of millions of people impacted by executive misspending and overreach: the American people.

The erosion of our nation’s separation of powers poses tangible and destructive impacts for constituents, states and localities, and the operation of government. Our communities count on the funds we appropriate. Whether it’s disaster relief, infrastructure investments, improving our military bases and housing, or strengthening our education and health care systems, the American people need to know that when their representatives in Congress pass an appropriations bill and it is signed into law, a structure is in place to ensure that that money gets to the people who need it.

That is why the growing lack of transparency around how the executive branch uses non-public apportionments to exert control over agencies’ spending is a major problem. Too often this leaves the American people and our allies abroad wondering whether, when, and how they will get the support they need – and were promised by Congress. To help protect and enforce its spending decisions, Congress established the Government Accountability Office, a non-partisan legislative office charged with investigating and reporting on violations of budget and appropriations laws. Since its inception, GAO has uncovered numerous instances of executive misspending and impoundment. But even this non-partisan agency has faced executive stonewalling, underscoring the need for stronger laws that demand compliance.

For Congress to remain a co-equal branch of government and fulfill its constitutional responsibility to control how the people's tax dollars are spent, we must reassert Congress' control over spending and ensure we are the ones holding the purse strings. Increasing transparency and accountability will enable Congress to provide the oversight of the executive branch that our Founders intended.

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Today we will have the opportunity to explore reforms that will help our government better serve the people and operate more like the democracy our Founders envisioned. I look forward to what our expert witnesses have to say.

And I now yield five minutes to the Ranking Member.

Mr. WOMACK. I thank the Chairman for this hearing, and thank you to today's witnesses for being here to discuss what I consider to be a very important topic.

One of the most significant responsibilities afforded to Congress is the power of the purse, clearly stated in our Constitution. Our nation's founding document makes clear that budgeting is not a secondary part of governance, but fundamental to it. There is no escaping the fact that a breakdown in the budget process has exacerbated our dire fiscal situation and the ensuing policy challenges. This Committee has felt this dysfunction firsthand.

Democrats did not produce a budget resolution last year, and they will not do a budget resolution this year. American families and businesses budget every day. They set budgets for the day, the month, the week, and the year. And my guess is families across America are reevaluating those budgets, based on the current COVID-19 situation.

Yet here in the People's House, at the House Budget Committee, we won't do a budget. And while my Democrat colleagues on this Committee continually attempt to justify the inaction, some of their colleagues seem to recognize the problem at hand.

In fact, just this week, the Blue Dog Coalition submitted a letter to Chairman Yarmuth calling on the Budget Committee to produce a budget resolution. They recognized the serious fiscal situation we face and how a budget resolution is the critical tool that can establish the appropriate framework for the entire federal government.

The inability to complete the most basic part of the congressional budget process is telling of a much larger problem. Whether you are a Republican or Democrat, it makes no difference. There is no denying that both chambers have relinquished power and failed to adhere to the budget process prescribed by law.

Congress has not followed regular order; that is, adopting a budget resolution conference report and separate annual appropriations bills before the start of the Fiscal Year since 1995. That is nearly 25 years of dysfunction, 25 years of a diminished role in policymaking authority. And let me just add, it creates what is—I call a “new normal” for new Members of Congress to think that this is a normal way of doing business.

While this is a concern of mine and one that needs to be addressed by Congress, there is a much larger issue here. One of the greatest problems we face is the fact that we have surrendered our authority to unchecked mandatory spending.

A majority of federal spending is currently running on autopilot without limit or approval; it is exactly the opposite of what our Constitution prescribes. We need to reclaim our authority and bring credibility back to the budget and appropriations process. Our budget process was written in the 1970's; it does not align with the dynamics of the modern Congress.

The Joint Select Committee on Budget and Appropriations Process Reform, of which I served as co-chair, examined this very issue during the 115th Congress. We ultimately produced a bipartisan, bicameral package of reforms, one supported by my colleague, Chairman Yarmuth. Unfortunately, we were unable to achieve the

required super-majority to affirmatively report the legislation out of committee.

Although the outcome was not what I had hoped, I remain committed to enacting comprehensive reform that improves our budget and appropriations process. This should be a bipartisan priority and one that includes collaboration by both parties and both chambers.

In 2019, Senate Budget Committee Chairman Enzi was successful in reporting a bipartisan and comprehensive budget process reform out of his Committee. I applaud Chairman Enzi, all of the Committee Republican and Democrat senators, Whitehouse, Kaine, Van Hollen, and Warner for putting aside partisan politics in producing much needed legislation.

We, in the House, must continue building on the bipartisan efforts of the Senate and the Joint Select Committee. It is my hope that today's hearing provides insight on ways to address the dysfunction in our budget and appropriations process. It is not only important to the effectiveness of Congress, but also to the country's long-term fiscal health.

With that, I yield back the balance of my time.

[The prepared statement of Steve Womack follows:]



**Ranking Member Steve Womack (R-AR)
Opening Remarks at Hearing Entitled:
Protecting Congress' Power of the Purse and
the Rule of Law**

Remarks as prepared for delivery:

Thank you, Chairman Yarmuth, for holding this hearing, and thank you to today's witnesses for being here to discuss this important topic.

One of the most significant responsibilities afforded to Congress is the power of the purse. It's a duty that is clearly stated in Article I, Section 9, Clause 7 of the Constitution.

Our nation's founding document makes clear that budgeting is not a secondary part of governance — but fundamental to it. There is no escaping the fact that a breakdown in the budget process has exacerbated our dire fiscal situation and the ensuing policy challenges. This committee has felt the dysfunction firsthand.

Democrats did not produce a budget resolution last year, and they have publicly stated that they will not be writing a budget resolution this year. American families and businesses budget every day. They set budgets for the day, the month, the week and, the year. Yet, here in the people's House, at the House Budget Committee, we haven't produced a budget. And while my Democrat colleagues on this Committee

continually attempt to justify their inaction, some of their colleagues seem to recognize the problem at hand.

In fact, just last week, the Blue Dog Coalition submitted a letter to Chairman Yarmuth calling on the Budget Committee to produce a budget resolution. They recognize the serious fiscal situation we face, and how a budget resolution is the critical tool that can establish the appropriate framework for the entire federal government.

The inability to complete the most basic part of the congressional budget process is telling of a much larger problem. Whether you are a Republican or Democrat, there is no denying that both chambers have relinquished power and failed to adhere to the budget process that is prescribed by law.

Congress has not followed regular order — adopting a budget resolution conference report and separate annual appropriations bills before the start of the subsequent fiscal year — since 1995. That's nearly 25 years of dysfunction and 25 years of a diminished role in policy making authority.

While this is a concern of mine — and one that needs to be addressed by Congress — there is a much larger issue here. One of the greatest problems we face is the fact that we have surrendered our authority to unchecked mandatory spending. A majority of federal spending is currently running on auto-pilot — without limit or approval. It's exactly the opposite of what our Constitution prescribes.

We need to reclaim our authority and bring credibility back to the budget and appropriations process. Our budget process was written in the 1970's — and it does not align with the dynamics of the modern Congress.

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Although the outcome wasn't what I had hoped, I remain committed to enacting comprehensive reform that improves our budget and appropriations process. This should be a bipartisan priority, and one that includes collaboration by both parties and chambers. In 2019, Senate Budget Committee Chairman Enzi was successful in reporting a bipartisan and comprehensive budget process reform package out of his Committee. I applaud Chairman Enzi, all of the Committee Republicans, and Democrat Senators Whitehouse, Kaine, Van Hollen, and Warner for putting aside partisan politics and producing much needed legislation. We in the House must continue building on the bipartisan efforts of the Senate and the Joint Select Committee.

It is my hope that today's hearing provides insight on ways to address the dysfunction in our budget and appropriations process. It's not only important to the effectiveness of Congress, but also to our country's long-term fiscal health.

Thank you. I yield back the balance of my time.

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Chairman YARMUTH. Thank you for your opening statement. In the interest of time, if other Members have opening statements, you may submit those statements in writing for the record.

Once again, I would like to thank our witnesses for being here this morning. The Committee has received their written statements, and they will be made part of the formal hearing record. Each of you will have five minutes to give your oral remarks.

Professor Chafetz, you may begin when you are ready.

STATEMENT OF JOSH CHAFETZ, PROFESSOR OF LAW, CORNELL LAW SCHOOL, AND VISITING PROFESSOR AT THE UNIVERSITY OF TEXAS AT AUSTIN SCHOOL OF LAW

Mr. CHAFETZ. Chairman Yarmuth, Ranking Member Womack, and Members of the Committee, thank you very much for the opportunity to testify today regarding the scope and implications of the congressional power of the purse.

The power of the purse is one of the most potent tools in the congressional toolbox. Not only does the Constitution give Congress, and preeminently this House, the lion's share of power over matters of taxing and spending, but that control over budgetary matters also gives Congress significant latitude when bargaining with the executive branch over collateral policy matters.

This was a hard-won lesson for the generation that drafted and ratified the Constitution. They were intimately familiar with 17th Century conflict between the English Parliament and the Stuart Crown, much of which centered around who would have the power to tax and spend money.

After the glorious revolution in which a Stuart Monarch was deposed for the second time in less than 50 years, Parliament ensured that the Crown would thereafter be almost wholly dependent on the legislature for funds. And that was one of the most significant steps in the democratization of the English Constitution.

Well Colonial American assemblies, who were, after all, at the time English subjects in the 18th Century, knew this history intimately and they looked to it for resources in their battle with royal Governors and royal judges. Zeroing out executive and judicial salaries, and even refusing to pay rent on the royal Governor's house, were among the Assembly's favorite tools of resistance to royal authority.

Indeed, the fact that the Crown took to paying Colonial judges' salaries out of Imperial funds so as to diminish the Assembly's power of the purse, was one of the complaints memorialized in the Declaration of Independence. That is to say, one of the justifications for the American Revolution that the Colonists offered was that the Crown was paying its own judges.

Small wonder then, that in the years after independence, both the Republican State Constitutions and the New Federal Constitution drafted in 1787 ensured that the power of the purse remained firmly lodged in the legislature. And in particular, in the House of the legislature closest to the people.

Indeed, the fact that Congress held the purse strings was one of the most common Federalist rejoinders to Anti-Federalist fears of a monarchical presidency. That is to say, it was one of the most important talking points in favor of the Constitution as the sort of

fledging Americans were debating whether or not to adopt this new instrument of governance.

Subsequent developments, ranging from the insistence on annual appropriations to the creation of the Treasury in 1789, to the creation of the standing House Ways and Means Committee in 1795, to the Miscellaneous Receipts Statute and the Antideficiency Act in the 19th Century all involved efforts by Congress to preserve and defend the leverage that the power of the purse gives it in inter-branch negotiations.

But Congress gave away some of that power in a nod to the growth of the administrative state in the 1921 Budget Act. But half-a-century of experience convinced it to take a good bit of it back with the 1974 Budget and Impoundment Control Act.

In short, Congress has repeatedly reacted against the attempts to encroach on its power of the purse and it may well be time for the next episode of congressional reassertion in this sphere.

In particular, let me briefly mention six ways, which in my view, Congress' power of the purse could be strengthened. And each of these are more fully elaborated in the written testimony I have submitted, as is the historical development that I have just outlined.

First, greater use should be made of zeroing out some item or salary as a way of combatting executive overreach, and especially, as a way of enforcing contempt of Congress citations. If the South Carolina Colonial Legislature could refuse to pay the rent on the royal Governor's house, then Congress can refuse to pay the salary of a contumacious executive official.

Second, appropriations bills should be drafted so as to make clear that riders are not severable from appropriations. If OLC wants to declare a rider unconstitutional, the executive should have to sacrifice the underlying spending. Moreover, the loss of the entire appropriation is more likely to create a justiciable case or controversy than the loss of the rider alone. And so non-severability may be a way in which Congress can enlist the courts as allies in the battle over budgetary control.

Third, criminal penalties should be added to the Impoundment Control Act just as they already exist in the Antideficiency Act. Illegal impoundments are serious matters and the code should reflect that.

Fourth, the Antideficiency Act itself should be tightened to prevent executive gamesmanship around the essential/non-essential personnel distinction during a lapse in appropriations.

Fifth, both houses of Congress should engage in significant capacity building. Both bulking up the number and pay of Member and Committee staff, as well as, the staff at non-partisan institutions like GAO, CBO, and CRS. It is impossible to check the executive without the capacity to adequately monitor the executive.

And I would add that the work done by the Modernization Committee, and in particular, the resolution passed yesterday, is a significant step in this direction.

Finally, I agree with the Ranking Member, that Congress should seek to return to the regular orthodox annual budget process laid out in the 1921 and 1974 Acts. That process was built to harness the expertise on both this Committee and the Appropriations Com-

mittee in the service of granular congressional control over spending. The turn to continuing resolutions and omnibus bills has diminished ongoing congressional control over budgetary matters.

The power of the purse is one of the most significant congressional tools that the Constitution gives to Congress, and Congress should ensure that it's using it to its full potential.

Thank you very much.

[The prepared statement of Josh Chafetz follows:]

“Protecting Congress’s Power of the Purse and the Rule of Law”

Hearing Before the House Budget Committee

Wednesday, March 11, 2020, 10:00 AM

Testimony of Josh Chafetz

Professor of Law, Cornell Law School

Visiting Professor of Law, University of Texas School of Law

Chairman Yarmuth, Ranking Member Womack, and Distinguished Members of the Committee:

Thank you for the opportunity to testify today regarding the scope and implications of the congressional power of the purse. My name is Josh Chafetz, and I am a Professor of Law at Cornell, and for the current semester a Visiting Professor of Law at the University of Texas. My research and teaching focus on legislative procedure, the separation of powers, and the constitutional structuring of American national politics. Much of my testimony today will draw on research conducted for my book, *Congress’s Constitution: Legislative Authority and the Separation of Powers*, published in 2017 by Yale University Press, and I have appended a chapter from that book to this testimony.

CONSTITUTIONAL AUTHORITY

Let me begin by laying out the constitutional provisions relevant to Congress’s power of the purse. First, there is the Article I, sec. 9, cl. 7 Appropriations Clause: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” This provision was designed to make it absolutely clear that Congress is the principal decisionmaker for how money will be spent. The president may appoint the Secretary of the Treasury (with the advice and consent of the Senate), but the Secretary is constitutionally forbidden from disbursing a single dime unless he or she can point to some enacted law authorizing the expenditure.

The Appropriations Clause is paired with the Statement and Account Clause: “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” This provision is both public-facing and Congress-facing—that is, it aims both to ensure that the public can understand how its money is spent and to ensure that Congress can monitor expenditures for compliance with appropriations statutes and, more broadly, with the expectations that members had when they drafted and voted for those statutes.

Third, there is the Article I, sec. 7, cl. 1 Origination Clause: “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.” In other words, although revenue-raising bills go through the normal lawmaking process involving bicameralism and presentment, they have to take a more specific path than other sorts of bills: they must begin in the House. This was a reflection of the fact that the House is closer to the people than the Senate is. The House has much shorter terms; Representatives have fewer constituents than Senators (in all but a few states); and the entire

House is up for election at the same time. Moreover, until the ratification of the Seventeenth Amendment in 1913, only Representatives were directly elected by the people. The Origination Clause thereby gives the body most immediately responsive to the people the primary responsibility over taxation, by requiring that all revenue-raising proposals begin in the House of Representatives. Although it is not in constitutional text, there is a longstanding tradition that the House also originates general appropriations measures, for similar reasons.¹

The final relevant piece of constitutional text is the Article I, sec. 8, cl. 12 provision that “The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.” This was meant to prevent a standing army from threatening the liberty of the citizens: if money could not be appropriated for more than two years—that is, a single Congress—then the people, by voting in a new House majority, could defund an oppressive military.

HISTORICAL BACKGROUND

These constitutional provisions were not drafted on a blank slate. They were, instead, the fruits of hard-won experience, especially under the British Crown. Many of Parliament’s fights with the Crown, especially in the tumultuous seventeenth century, were centrally concerned with the interconnected powers to raise and spend money. Parliamentary consent was necessary for taxation, and if Parliament was going to hand over money to the Crown, it was going to demand a say in how that money was spent. Thus, as early as the thirteenth century, parliamentary grants of revenue came with appropriations provisions.²

This was especially salient to members of Parliament because the need for taxation most frequently arose in connection with war. The threat to subjects’ purses was thus coupled with the threat to their liberties posed by the raising of an army. A great many of the fights between the first two Stuart monarchs—James I and Charles I—and their Parliaments were occasioned by their desire to raise money to engage in foreign adventuring.³ Indeed, Charles I’s attempts to raise revenue *without* parliamentary authorization were significant landmarks on the road to the English Civil War, which ultimately led to his deposition and execution.

After the Restoration of the monarchy in 1660, there was a brief flowering of trust in the Crown, but war once again brought issues of taxing and spending to the fore. By 1665, when Charles II was seeking additional funds to fight the Second Anglo-Dutch War, provisions were inserted in the revenue legislation specifying that the money was only to be spent on the war and requiring detailed records open to public inspection.⁴ Many subsequent revenue bills in Charles’s reign had still more restrictive appropriations, and in 1667 Parliament even created what we would today call an independent auditing board, tasked with inspecting the books of royal officials and ensuring that money was being properly spent.⁵ In the 1670s and 1680s, two high-ranking royal

¹ See JOHN V. SULLIVAN, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 110-49, at 49 (2007).

² JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 46 (2017).

³ *Id.* at 46-47.

⁴ Taxation Act, 17 Car. 2, c. 1, §§ 5, 7 (1665).

⁵ See CHAFETZ, *supra* note 2, at 48-49. For the independent auditing board, see Account of Public Moneys Act, 19 & 20 Car. 2, c. 1 (1667).

officials—the Earl of Danby and Sir Edward Seymour—were impeached by the House of Commons, and in both cases the articles of impeachment specified that they had spent funds in a manner contrary to that specified by Parliament. In particular, both were accused of moving money around so as to maintain a standing army on English soil for longer than authorized by Parliament. Danby spent five years imprisoned in the Tower of London.⁶

When Charles II died in 1685, his brother James II came to the throne. In less than a year, he had thoroughly alienated Parliament, and he ensured that it did not meet again after November 1685. In 1688, he was overthrown in the Glorious Revolution.⁷

The Glorious Revolution is generally remembered as a turning point in the rise of parliamentary supremacy in England, but it is important to note that budgetary mechanisms played a key role in Parliament's consolidation of power. The 1689 Bill of Rights specifically criticized James II for "Levying Money for and to the Use of the Crowne, by pretence of Prerogative for other time and in other manner than the same was granted by Parlyament," and it went on to declare that such behavior was illegal.⁸ But this was not just an empty statement of principle: Parliament also took away nearly all of the Crown's sources of revenue that lasted either for the life of the monarch or in perpetuity, and it largely replaced them with annual appropriations.⁹ The great English historian George Macaulay Trevelyan explained the significance thus: "[T]he Commons took good care that after the Revolution the Crown should be altogether unable to pay its way without an annual meeting of Parliament.... Every year, [William III] and his Ministers had to come, cap in hand, to the House of Commons, and more often than not the Commons drove a bargain and exacted a quid pro quo in return for supply."¹⁰ Moreover, post-Revolution Parliaments regularized the practice of specifically appropriating the funds that it granted to the Crown.¹¹ These were among the most important mechanisms in enabling the eighteenth-century rise of parliamentary sovereignty, cabinet government, and ministerial responsibility to Parliament—that is, the beginning of the democratization of the English and British constitutions.

This was not ancient history to the American founding generation. The eighteenth-century colonial legislatures, elected by the colonists but frequently at odds with governors and other officials appointed in London, looked to the seventeenth-century struggles between Parliament and the Stuart Crown as precedents.¹² Colonial assemblies generally appropriated funds in great detail and maintained substantial auditing powers. When the assemblies were displeased with

⁶ CHAFETZ, *supra* note 2, at 49-50. Technically, Danby was imprisoned on an attainder arising out of the same complaints, rather than the impeachment. Seymour was spared punishment when Charles dissolved Parliament before the Lords could vote on his impeachment.

⁷ *Id.* at 50-51.

⁸ 1 W. & M., sess. 2, c. 2, § 1, cl. 4 (1689); *id.* § 2, cl. 4.

⁹ CHAFETZ, *supra* note 2, at 51.

¹⁰ G.M. TREVELYAN, *THE ENGLISH REVOLUTION, 1688-1689*, at 96 (1965).

¹¹ CHAFETZ, *supra* note 2, at 51-52.

¹² See CHAFETZ, *supra* note 2, at 4-5; JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY* 189-99 (1994); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 20 (1996); JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 29 (1989). For specific colonial examples, see, e.g., WARREN M. BILLINGS, *A LITTLE PARLIAMENT: THE VIRGINIA GENERAL ASSEMBLY IN THE SEVENTEENTH CENTURY* 36-38 (2004); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 55 (2005).

the behavior of royal officials, they frequently withheld or diminished their salaries. In 1751, the South Carolina House of Commons refused to pay the rent on the governor's house after he had exercised the royal veto one too many times.¹³

The assemblies understood that tugging on the purse strings was one of their most potent weapons. In response, London began paying some royal judges' salaries out of imperial revenues, which became one of the complaints lodged by the rebellious colonists in the Declaration of Independence. The King, they complained, "had made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." The assemblies were upset that the Crown was paying its own judges, because the power to pay—or to withhold payment—is the power to influence, if not control, and the assemblies wanted that power for themselves.

When it came time for the newly independent states to draft their own constitutions, they opted for powerful legislatures and weak governors.¹⁴ Unsurprisingly, then, legislatures were given significant control over revenue and appropriations. As the constitutional scholar Gerhard Casper put it, the early republican state constitutions "confirm our understanding that during the founding period, money matters were primarily thought of as a legislative prerogative."¹⁵

This was the background against which the constitutional provisions laid out above were drafted and ratified in 1787-88. The political elites of the founding generation were drawing on over two centuries of Anglo-American constitutionalism surrounding money matters, constitutionalism that encompassed a number of conflicts with which educated politicians of the day were intimately familiar. And even though the Constitution created an executive more powerful than any state executive at the time, it nevertheless evinced an unmistakable desire to keep budgetary matters firmly under legislative control.¹⁶

Indeed, the fact that Congress—and in particular the House of Representatives—would control the flow of money into and out of government coffers was the strongest Federalist response to Anti-Federalist arguments that the presidency was too powerful. When Patrick Henry worried in the Virginia ratifying convention that "Your President may easily become king. . . . The army is in his hands, and . . . the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master,"¹⁷ Madison answered by pointing to the fact that "[t]he purse is in the hands of the representatives of the people. They have the appropriation of all moneys."¹⁸ Hamilton likewise told the New York ratifying convention that "where the purse is lodged in one branch, and the sword in another, there can be no danger."¹⁹ Indeed, throughout the ratification

¹³ CHAFETZ, *supra* note 2, at 53-55.

¹⁴ See CHAFETZ, *supra* note 2, at 94-95; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 149 (rev. ed. 1998).

¹⁵ Gerhard Casper, *Appropriations of Power*, 13 U. ARK. LITTLE ROCK L. REV. 1, 8 (1990).

¹⁶ See CHAFETZ, *supra* note 2, at 56-57.

¹⁷ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 58-59 (Jonathan Elliot ed., 2d ed. 1907).

¹⁸ *Id.* at 393.

¹⁹ 2 *id.* at 349.

debates, we see the Federalists using congressional control over appropriations as a rejoinder to fears about presidential military might.²⁰

Once the Constitution was ratified and the new national government was up and running, the earliest Congresses made clear that they understood themselves to have special responsibility for matters of the purse. When it came time to set up the first three departments, two of them—Foreign Affairs and War—were expressly denominated “Executive department[s],” and their organic statutes specified that their heads were to carry out orders from the president.²¹ By contrast, the organic act for the Treasury Department did *not* refer to it as an “executive” department. Moreover, the act says nothing about taking direction from the president, but it does create specific reporting requirements to Congress.²² In short, the Treasury was understood as being not simply a creation of Congress, but a continuing arm of Congress.²³

What’s more, although the Constitution does not specify the *timeframe* for appropriations (except in the case of army appropriations), Congress’s practice from the very beginning has been to appropriate annually, as a way of maintaining ongoing granular control of how money is spent. The first appropriations statute was extremely brief—it simply divided the \$639,000 federal budget into four categories and provided no further specification.²⁴ But as nascent partisan competition picked up beginning in the mid-1790s, appropriations got more detailed, and the House, at Jeffersonian financial expert Albert Gallatin’s suggestion, created the Ways and Means Committee to lessen the House’s dependence on the Treasury for financial expertise.²⁵

In the nineteenth century, Congress passed two important statutes in response to significant threats to its power of the purse. The first is the Miscellaneous Receipts Statute, first passed in 1849,²⁶ which required (with some exceptions) that all money coming into the federal government be deposited in the Treasury. This was meant to ensure that executive officials could not maintain slush funds from which they controlled expenditures. Once the money is deposited in the Treasury, it is subject to the Appropriations Clause’s prohibition on its being withdrawn except “in Consequence of Appropriations made by Law.”

The second important statute is the Antideficiency Act, first passed in 1870.²⁷ The passage of the Antideficiency Act was prompted by the practice of “coercive deficiencies”: situations in which government departments would create obligations in excess of appropriations and thereby pressure Congress to make good on the department’s promises. The Act not only prohibited

²⁰ See Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 78-83 (1998) (collecting examples).

²¹ An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 4, 1 Stat. 28 (1789); An Act to Establish an Executive Department, to be Denominated the Department of War, ch. 7, 1 Stat. 49 (1789).

²² An Act to Establish the Treasury Department, ch. 12, §§ 1-4, 1 Stat. 65, 65-66 (1789).

²³ See CHAFETZ, *supra* note 2, at 58.

²⁴ Appropriations Act, ch. 23, 1 Stat. 95, 95 (1789).

²⁵ CHAFETZ, *supra* note 2, at 58-59.

²⁶ Ch. 110, § 1, 9 Stat. 398, 398-99 (1849). The current version is codified at 31 U.S.C. § 3302(b).

²⁷ Ch. 251, § 7, 16 Stat. 230, 251 (1870); Ch. 1484, § 4, 33 Stat. 1214, 1257-58 (1905). The current version is codified at 31 U.S.C. §§ 1341-42, 1349-50, 1517.

coercive deficiencies, it also forbade government officials from accepting any voluntary service not authorized by statute, except “for emergencies involving the safety of human life or the protection of property.”²⁸ An officer or employee of the government who violates the Antideficiency Act is subject to both administrative discipline (including possible termination)²⁹ and—uniquely among the fiscal statutes—criminal prosecution.³⁰

In the early twentieth century, Congress changed course somewhat. In a recognition of the budgetary imperatives of the growing administrative state, the Budget Act of 1921³¹ centralized budgetary authority in the executive, with the creation of the Budget Bureau in the Treasury Department (later moved into the Executive Office of the President and renamed the Office of Management and Budget (OMB)). At the same time, it created a partial congressional counterweight with the General Accounting Office (later renamed the Government Accountability Office (GAO)). Roughly contemporaneous cameral resolutions gave exclusive jurisdiction over appropriations legislation to the Appropriations Committees.³² Even with these counterweights, however, the 1921 Act has been understood as ushering in a period of “presidential dominance” of the budget process,³³ a period that lasted for half a century.

In the aftermath of Nixon-era abuses of the process, the Budget Act of 1974³⁴ (signed by President Nixon less than a month before his resignation) created a number of new counterweights to executive-branch budgetary authority: it created this Committee and its Senate counterpart; it created the Congressional Budget Office (CBO); and it established the “orthodox” process of budget resolutions structuring the appropriations process. Each of these can be understood as congressional capacity-building meant to blunt some of the executive advantage in budgeting, such that, post-1974, it is no longer the case that the White House dominates the budget process.³⁵

Finally, the Impoundment Control Act of 1974 was passed as part of that year’s Budget Act.³⁶ Responding to the explosive growth in policy impoundments under Nixon,³⁷ the Act laid out tight controls on both rescissions and deferrals of spending by the White House.³⁸ Congress’s meaning was clear: when it appropriates money, that money is to be spent for the purposes for which it was appropriated, and presidents’ ability to thwart those purposes by simply refusing to spend the money should be severely limited.

²⁸ 31 U.S.C. § 1342.

²⁹ *Id.* § 1349(a).

³⁰ *Id.* § 1350.

³¹ Budget and Accounting Act, Pub. L. No. 67-13, 42 Stat. 20 (1921).

³² See CHAFETZ, *supra* note 2, at 63.

³³ ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 14-18 (3d ed. 2007).

³⁴ Budget Act, Pub. L. No. 93-344, 88 Stat. 297 (1974).

³⁵ See CHAFETZ, *supra* note 2, at 63-64; SHICK, *supra* note 33, at 18-20.

³⁶ Pub. L. No. 93-344, §§ 1001-17, 88 Stat. 297, 332-39 (1974), codified at 2 U.S.C. §§ 681-88.

³⁷ See Allen Schick, *Whose Budget? It All Depends on Whether the President or Congress Is Doing the Counting*, in *THE PRESIDENCY AND THE CONGRESS: A SHIFTING BALANCE OF POWER* 96, 103 (William S. Livingston et al. eds., 1979).

³⁸ See CHAFETZ, *supra* note 2, at 64-66.

CONTEMPORARY CONCERNS

The power of the purse is tremendously important. From Parliament's struggles against the Stuart monarchs to the colonial assemblies' tussles with royal governors to debates over the direction of policy in today's administrative state, the power of the purse allows legislators to play a central role in governance. Crucially, the power of the purse is not just about taxing and spending. It also gives Congress a potent tool that it can use to secure policy concessions from the executive in collateral areas.

But the fact that the tool remains as potent as ever does not mean that it is always used to maximum effect. In particular, let me suggest six ways in which I think Congress may not currently be using its power of the purse as effectively as possible.

First, I'd like to suggest that, in conflicts with the executive, greater—and perhaps more regularized—use be made of provisions zeroing out funding for some specific office or even salary. It is unclear to me why the House would want to pay the salary of someone whom it has held in contempt and who has refused to purge that contempt. Indeed, I'd suggest that the standing rules of the House incorporate a provision providing a point of order against any appropriations bill that provides a salary to any executive officer who is currently in contempt of Congress. Of course, we all know that points of order can be waived, but they also have an anchoring effect.

Second, I would suggest that appropriations bills contain *non-severability* clauses. As it stands now, if the Office of Legal Counsel decides that a rider in an appropriations bill is unconstitutional, then the executive considers itself free to spend the appropriated funds without the restriction imposed by the rider.³⁹ In effect, the OLC's determination acts as a de facto line-item veto of the rider alone. A non-severability clause would significantly up the cost to the executive of making this determination: it would, in effect, say, "You can decide that this rider is unconstitutional, but in that case you lose the appropriation to which it was attached, as well." (On a related note, albeit one that is not budget-specific, I would recommend that OLC be required to disclose more of its work product and to do so in a more timely fashion, so that Congress and the public have adequate notice of such decisions.)

Third, I would suggest the addition of criminal penalties to the Impoundment Control Act, just as they already exist in the Antideficiency Act. This would signal that illegal impoundments are not some minor foible; they are a serious threat to the separation of powers, and an official—whether the Director of OMB or the president herself—who makes use of them is in peril of future prosecution.

Fourth, speaking of the Antideficiency Act, I would propose tightening the language surrounding the acceptance of voluntary services. In particular, OLC and OMB have interpreted "emergencies involving the safety of human life or the protection of property" *extremely*

³⁹ For published examples of OLC deciding just that, see, e.g., Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C., 2011 WL 4503236 (Sept. 19, 2011); Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C., 2009 WL 2810454 (June 1, 2009).

capaciously.⁴⁰ The effect has been that, during lapses in appropriations, the executive can manipulate which government employees show up to work—either lessening the pain and thereby strengthening the president’s ability to hold out for his preferred outcome, or concentrating the pain in certain highly visible ways designed to make Congress look bad. Diminishing executive discretion in this area should be an important goal for Congress.

Fifth, both houses of Congress should engage in some serious capacity building. Recall that creating capacity within Congress was central to everything from early interbranch conflict in the 1790s to the creation of GAO in 1921 to many of the reforms in the 1974 Act. Without the capacity to find facts and conduct investigations on its own, Congress is necessarily at the mercy of what information the executive branch chooses to share; without the capacity to stage effective presentations of the information at its disposal, Congress is necessarily at a disadvantage vis-à-vis the executive with regard to public persuasion.⁴¹ And yet congressional capacity—as measured by the number of member and committee staff, the number of staff at nonpartisan institutions like CBO, GAO, and the Congressional Research Service, staff tenure in office, and staff pay—has been in decline for decades.⁴² Increasing congressional capacity across the board was a major recommendation of the American Political Science Association Task Force on Congressional Reform (on which I served),⁴³ and I believe it would pay significant dividends in strengthening Congress’s power of the purse, in particular.

Finally, I would argue for a return to the orthodox budgeting process—which is to say, the budget process as outlined by a combination of the 1921 and 1974 Acts. That process—and especially the 1974 components—was designed to make Congress an effective counterweight to the executive, and in particular to allow Congress to instantiate its policy views into law via the budget process. The turn away from budget resolutions and the full suite of appropriations bills, and toward continuing resolutions and omnibus bills, deprives Congress of the full benefit of the expertise and deliberation that happen in this Committee and the Appropriations Committee and makes it harder to use the process to press for meaningful policy change. I would add that the sometimes-expressed desire to move to two-year budget resolutions is not, in my view, an improvement. It would simply deprive Congress of an important lever of power in half of all years.

⁴⁰ See Auth. to Employ the Servs. of White House Office Emps. During an Appropriations Lapse, 19 Op. O.L.C. 235, 235 (1995); Auth. for the Continuance of Gov’t Functions During a Temp. Lapse in Appropriations, 5 Op. O.L.C. 1, 11–12 (1981).

⁴¹ On the importance of Congress’s institutional tools of public persuasion, see Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. (forthcoming 2020), available at <https://ssrn.com/abstract=3546976>.

⁴² See Josh Chafetz, *Delegation and Time ... And Staff*, REGULATORY REV. (Mar. 4, 2020), <https://www.theregreview.org/2020/03/04/chafetz-delegation-time-staff/>; Josh McCrain, *Congressional Staff Salaries Over Time* (May 31, 2017), <http://joshuamccrain.com/index.php/2017/05/31/congressional-staff-salaries-over-time/>; R. ERIC PETERSON & SARAH J. ECKMAN, CONG. RESEARCH SERV., R44682, STAFF TENURE IN SELECTED POSITIONS IN HOUSE MEMBER OFFICES, 2006-2016 (2016); R. ERIC PETERSON & SARAH J. ECKMAN, CONG. RESEARCH SERV., R44688, CONGRESSIONAL STAFF: CRS PRODUCTS ON SIZE, PAY, AND JOB TENURE (2016); MOLLY REYNOLDS ET AL., BROOKINGS INST., VITAL STATISTICS ON CONGRESS ch. 5 (Mar. 2019), available at <https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf>.

⁴³ AM. POL. SCI. ASS’N TASK FORCE ON CONGRESSIONAL REFORM, TASK FORCE REPORT 8-16 (2019), available at <https://www.apsanet.org/Portals/54/APSA%20RPCI%20Congressional%20Reform%20Report.pdf?ver=2020-01-09-094944-627>.

What these five proposals have in common is that they do not aim to achieve any particular substantive goals. Rather, they aim at strengthening Congress *as an institution* by allowing and encouraging it to use the power of the purse to fuller effect. In doing so, they allow it to more fully inhabit the role that it was meant to play in our constitutional order.

Thank you.

23

JOSH CHAFETZ

Congress's Constitution

LEGISLATIVE AUTHORITY AND
THE SEPARATION OF POWERS

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The Power of the Purse

IT MAY APPEAR ODD TO BEGIN THE DISCUSSION of specific congressional powers with the power of the purse, given that this book focuses on mechanisms that are available to individual houses or members of Congress. After all, the power of the purse is exercised via legislation,¹ which requires both bicameralism and presentment.² These are among the more specific and determinate of constitutional provisions. But notice the converse of this fact: if directing money to be spent requires the concurrence of the House, the Senate, and the president (or sufficiently large House and Senate supermajorities),³ then either the House or the Senate, acting alone, can withhold money. Of course, this is true of any bill—the House and Senate are each absolute vetogates to the passage of legislation.⁴ But appropriations laws are different in that their passage is necessary to the continued functioning of the entire government. An annual budget process guarantees that, every year, each house of Congress has the opportunity to give meaningful voice to its priorities and its discontentments. As we shall see in this chapter, this tool has been underappreciated and, perhaps, underutilized.

Historical Development

Annual legislative appropriations have their roots in English parliamentary practice and became entrenched in the aftermath of the 1688–1689 Glorious Revolution. Before that, parliamentary control over appropriations had been sporadic, at best. As Maitland put it, “[T]hroughout the Middle Ages the king’s revenue had been in a very true sense the king’s revenue, and parliament had

but seldom attempted to give him orders as to what he should do with it.”⁵ This was in large part because most of the Crown’s revenue at that point came from what Blackstone termed “ordinary” sources—that is, either those sources of revenue that have “subsisted time out of mind in the crown; or else [have] been granted by parliament, by way of purchase or exchange for such of the king’s inherent hereditary rights.”⁶ Blackstone identified eighteen revenue sources that had traditionally been the Crown’s, including everything from ecclesiastical revenues to rents on the king’s demesne lands to feudal dues to custody of the persons and lands of idiots and lunatics.⁷ Extraordinary revenue, by contrast, consisted of various forms of taxation.⁸ The principle of parliamentary consent to taxation harkens back at least to Magna Carta’s requirement that any general aid be levied only by common counsel,⁹ and the requirement of consent by the Commons in particular dates back at least to the mid-fifteenth century.¹⁰ But the need for extraordinary revenue for a long time arose only in extraordinary circumstances—most commonly in wartime.

So long as Crown revenues came primarily from money due the king in his own person—that is, from ordinary sources—Parliament had little claim to dictate how it was to be spent. But as early as the thirteenth century, the nascent parliamentary body¹¹ asserted the right to appropriate extraordinary revenue;¹² in other words, if they were going to have to pay taxes, the magnates were going to have some say as to how those taxes would be spent.¹³ As Simon Payling has noted, it would be a mistake to view these medieval appropriations as evincing a right “of free refusal. For just as the representative nature of the Commons gave it this right of assent, the Crown had the right to demand a share of its subjects’ goods in times of common necessity.”¹⁴ It is, nevertheless, telling that, when asked to hand over money to the Crown, Parliament in the later Middle Ages not infrequently specified how that money was to be spent.¹⁵ To take just one example, in 1425 Parliament granted Henry VI certain extraordinary revenues “for the defense of the said Roialme of England”; in case that wasn’t clear enough, after specifying the revenues granted, the law repeats the stipulation: “The whiche grauntes of subsidies be made by the seid Commens, on the conditions that folwith. That is to sey, that it ne no part therof be beset ne dispendid to no othir use, but oonly in and for the defense of the seid Roialme.”¹⁶

Under the Tudors, Parliament was far more deferential to royal authority over expenditures—in Maitland’s words, it “hardly dared to meddle with such matters.”¹⁷ But, as with so many other constitutional principles, conflict returned

with the ascent of the Stuarts.¹⁸ This was in no small part due to what Conrad Russell—speaking literally—called “the poverty of the Crown.”¹⁹ As Russell noted, the financial system facing Charles I on the eve of the Civil War “was, in essentials, that of the fourteenth century.”²⁰ But, by the seventeenth century, the king’s ordinary revenues were no longer even remotely sufficient to cover the normal costs of royal governance.²¹ And the policies of the first two Stuart kings did not help: James I’s “inability to manage money was notorious both in Scotland and in England,”²² and Charles I began his reign with a series of expensive and unnecessary foreign policy adventures, each of which ended poorly.²³ This put Charles, especially, at the mercy of Parliament for the granting of extraordinary revenues; the combination of newfound parliamentary assertiveness²⁴ and Charles’s intransigence and remarkable “ability to rub people up the wrong way”²⁵ made it that much harder for him to get what he wanted out of Parliament. When Parliament refused to grant him supply or demanded too many concessions for doing so, he resorted to prerogative taxation—that is, essentially, collecting extraordinary revenues *without* parliamentary authorization. This, of course, further enraged an already alienated Parliament, reinforcing a vicious cycle that led to the Civil War and, ultimately, to Charles’s beheading.²⁶

The Commonwealth accustomed people to the idea of “national finances managed by a parliamentary committee,”²⁷ and so it is not entirely surprising to see the practice of specific appropriations attached to large grants of supply pick up steam after the Restoration. Although, as Maitland notes, the practice was not invariably followed under Charles II,²⁸ the extent to which it was followed was remarkable. Several of the monarchy’s “ordinary” sources of revenue (in the Blackstonian sense of the word) were abolished at the Restoration;²⁹ they were replaced with certain grants made to Charles II for life and others made to him and his heirs in perpetuity.³⁰ These grants, as was only natural, came with no strings attached; they were, after all, simply making up for lost sources of unencumbered revenue. But these grants were also indicative of the prevailing trust between the restored monarch and his Parliament³¹—with the exception of three grants of supply in 1660 that were intended to pay and decommission the bulk of the Republican army and navy,³² no grant of extraordinary supply between 1660 and 1665 came with any sort of appropriation.³³

As was so often the case with the Stuarts, it was the debts created by foreign entanglements that began to cause friction with Parliament. The outbreak of the

Second Anglo-Dutch War in 1665 “squandered” the “initial goodwill on the parts of both king and parliament,”³⁴ and this mistrust is apparent in the sudden profusion of specific appropriations provisions in revenue bills. Charles II first came to Parliament in late 1664 seeking the princely sum of £2.5 million to fight the war over two and a half years.³⁵ In the course of requesting the aid, he felt compelled to dismiss the “vile Jealousy, which some ill Men scatter abroad . . . that, when you have given Me a noble and proportionable Supply for the Support of a War, I may be induced by some evil Counsellors . . . to make a sudden Peace, and get all that Money for My own private Occasions.”³⁶ This time, a majority of the House of Commons believed him—he was narrowly voted the funds he sought, without any specific appropriations attached.³⁷ But it seems the suspicion did not fully disappear; when in 1665 he sought and received an additional £1.25 million for the war, a clause was inserted in the revenue-raising legislation providing that “noe moneyes levyable by this Act be issued out of the Exchequer durement this Warr but by such Order or Warrant mentioning that the moneyes payable by such Order or Warrant are for the service of Your Majestie in the said Warr respectively.”³⁸ Indeed, to make sure that the appropriation was adhered to, the act also required specific and meticulous recordkeeping³⁹ and insisted that the records be open for public inspection.⁴⁰ The next year, when it was clear that yet more money was needed for the war, Parliament passed a poll tax containing not only a specific appropriation of the funds for the war,⁴¹ and a right of anyone considering lending money to the Crown to inspect the books,⁴² but also a specific limitation: “[T]hirty thousand pounds and noe more of the money to be raised by this Act may be applyed for the payment of His Majesties Guards.”⁴³ This limitation was important—Charles’s personal guard was the first royal standing army in England,⁴⁴ and it was created not by statute but by royal prerogative (the first standing army in England was, of course, Cromwell’s New Model Army, parts of which were reformed into Charles’s guard).⁴⁵ Once Charles’s initial honeymoon period wore off, the maintenance of this force became a significant source of friction between the king and his people.⁴⁶ Indeed, the fear of a standing army under royal command was so pervasive that Charles soon felt the need to address it head-on: in a speech proroguing Parliament in July 1667, “His Majesty further said, He wondered what One Thing He had done since His coming into *England*, to persuade any sober Person that He did intend to govern by a Standing Army; He said He was more an *Englishman* than so.”⁴⁷

Perhaps because of this widespread suspicion of Charles's motives, the only other two revenue bills passed during the war contained appropriations provisions as well.⁴⁸ In one of those acts, Parliament directed that a sizable chunk of the revenue raised be used to pay seamen's wages, and it threatened the treasurer of the navy with treble damages if he diverted any of that money to any other purpose.⁴⁹ And to make sure that the funds were being used as directed, Parliament passed a law creating what we might anachronistically call an independent auditing board, charged with looking over the books of all of the officials who had received funds earmarked for the war and ensuring that the money was spent properly.⁵⁰

Consistent with Patterson's observation that trust between king and Parliament was briefly "rebuilt" after the end of the Second Anglo-Dutch War,⁵¹ grants of supply in the early 1670s did not generally come with appropriations provisions.⁵² But the goodwill quickly dissipated, as a result of the Third Anglo-Dutch War and the fear that Charles was too friendly toward the French. Beginning again in 1677, nearly every grant of extraordinary revenue for the remainder of Charles II's reign came with an appropriating clause, an auditing provision to ensure that the appropriation was followed, and stiff penalties for any Crown official caught putting the money to any unsanctioned use.⁵³ Nor were these idle threats: in 1678, the House of Commons impeached the Earl of Danby, one of Charles's highest officials. There were six articles of impeachment, the second of which charged Danby as follows:

[H]e did design the Raising of an Army, upon Pretence of a War against the *French* King; and then to continue the same as a Standing Army within this Kingdom: And an Army being so raised, and no War ensuing, an Act of Parliament having passed to pay off and disband the same, and a great Sum of Money being granted for that End, he did continue this Army contrary to the said Act, and misemployed the said Money, given for disbanding, to the Continuance thereof; and issued out of his Majesty's Revenue divers great Sums of Money for the said Purpose; and wilfully neglected to take Security from the Paymaster of the Army, as the said Act required; whereby the said Law is eluded, and the Army is yet continued, to the great Danger and unnecessary Charge of his Majesty and the whole Kingdom.⁵⁴

In other words, Danby was charged with violating a specific appropriations provision, and with doing so in order to maintain a standing army on English soil. Before the Lords could vote on Danby's impeachment, Charles pardoned

him, which led to a debate in Parliament as to whether a royal pardon was effective against impeachments. While that debate was still ongoing, both houses passed a bill of attainder against Danby, upon which he was arrested; he spent the next five years in the Tower of London.⁵⁵ While he was there, another royal official, Sir Edward Seymour, was impeached. The first article charged him with violating a specific appropriation that certain money was to be used only to build and outfit naval vessels; Seymour instead, as treasurer of the navy, lent some of that money for the purpose of maintaining the standing army past the date at which Parliament had ordered it disbanded, “whereby the said Two several Acts were eluded.”⁵⁶ The second article against Seymour likewise charged him with violating a specific appropriation.⁵⁷ A snap dissolution of Parliament in January 1681 ended the proceedings against Seymour before the Lords could vote.⁵⁸

After this dissolution, Charles, fed up with parliamentary interference, ruled without Parliament, and therefore without any parliamentary taxation, for the rest of his reign.⁵⁹ The overall trend in Charles’s reign is clear: once the initial honeymoon period wore off around 1665, Parliament was largely unwilling to grant him additional money without specifying in some measure how it was to be used. In addition, Parliament got into the habit of providing monitoring mechanisms and penalties for disobedient royal officials.

When Charles’s brother James came to the throne in 1685, the “Loyal Parliament”—so called because it was dominated by those loyal to the new, Catholic monarch—quickly confirmed all of the same life grants (that is, the substitutes for old sources of ordinary revenue) that had been made to his brother.⁶⁰ Shortly thereafter, it also granted him temporary customs duties on wine and vinegar,⁶¹ tobacco and sugar,⁶² and various cloths and liquors.⁶³ Although the last of these grants was meant to aid James in suppressing the Monmouth Rebellion,⁶⁴ none of them contained an appropriations provision. After the rebellion was suppressed, James, having been made financially comfortable by Parliament,⁶⁵ indicated that he had no intention of disbanding the standing army under his control.⁶⁶ This, combined with his determination to dispense with the Test Act (which prevented Catholics from holding public office),⁶⁷ turned even many of the Tories in Parliament against him,⁶⁸ and in November 1685, the House of Commons voted not to take up the matter of supply for the Crown.⁶⁹ A week later, James prorogued Parliament;⁷⁰ although it technically remained in existence until July 1687, it never sat again. There were to be no more parliaments in James II’s brief reign.

And then, of course, came the second deposition of a Stuart monarch in as many generations. Afterward, a large part of Parliament's goal in stitching together the Revolution Settlement was to ensure that monarchs would no longer feel free to rule without Parliament. To this end, Parliament attacked, among other things, what were seen as two mutually reinforcing pillars of monarchical authority in Restoration England: royal revenues and royal control over a standing army. The Bill of Rights specifically criticized James II both for "Levying Money for and to the Use of the Crowne, by pretence of Prerogative for other time and in other manner then the same was granted by Parlyament" and for "raising and keeping a Standing Army within this Kingdome in time of Peace without Consent of Parlyament."⁷¹ The Bill of Rights went on to prohibit both of these things, as well as to require the calling of frequent parliaments.⁷²

But even before the passage of the Bill of Rights, Parliament had begun to take more concrete steps to put these principles into action. First, it took away almost all of the remnants of the Crown's ordinary revenue. It began by repealing the hearth tax, which had been perpetual, and replacing it with an annually granted land tax.⁷³ Grants of tonnage and poundage and duties on woolen cloth, which had been granted for life, were now granted for only four years.⁷⁴ Only a relatively small amount of revenue was granted William and Mary for life or longer.⁷⁵ The importance of this move to annual appropriations cannot be overstated. Blackstone described the loss of the Crown's ordinary revenue as "fortunate[] for the liberty of the subject,"⁷⁶ and Trevelyan explains why: "[T]he Commons took good care that after the Revolution the Crown should be altogether unable to pay its way without an annual meeting of Parliament. William had no large grant made him for life. Every year he and his Ministers had to come, cap in hand, to the House of Commons, and more often than not the Commons drove a bargain and exacted a quid pro quo in return for supply."⁷⁷ That is to say, the granting of revenue only for a short duration not only forced the regular calling of parliaments—something all four of the Stuart monarchs had tried, at one time or another, to do without—but also forced regular negotiation with Parliament, and those negotiations often led to concessions.

Moreover, after the Revolution, it became common practice (as it had been during much of Charles II's reign) for Parliament to specifically appropriate the funds that it raised for the Crown, and to threaten severe punishments upon any royal official using the funds for any other purpose.⁷⁸ Indeed, as Gill has noted, it was shortly after the Revolution that a proto-annual budget made its first

appearance, a natural outgrowth of the new royal need for annual parliamentary grants.⁷⁹ And this proto-budget as passed by Parliament was not always identical to the budget the Crown requested.⁸⁰ Moreover, throughout the reigns of William and Mary and of Anne, Parliament regularly created Commissions of Public Accounts, staffed by members of Parliament, to look into how the Crown was spending appropriated funds.⁸¹

The second, and related, key element of the Revolution Settlement for our purposes was parliamentary control over the military. As we have already seen, there was deep suspicion of standing armies on English soil, and many of the Restoration fights over finance were intimately bound up with fights over a standing army. Thus, in the Mutiny Act, which created a criminal offense of mutiny against the army, Parliament provided that the penalties would sunset within a year.⁸² Subsequent Mutiny Acts followed suit every year for nearly two centuries.⁸³ Each year, the monarchs were thus faced with a tripartite choice: they could disband the standing army; they could call a Parliament that year; or, if they did neither of those, they would run the risk of soldiers deserting without fear of consequence. If they chose either to disband the army or to call a Parliament, then they would be adequately constrained in their exercise of power.

What both of these elements of the Revolution Settlement have in common is their creation of an annual baseline. They did not require the monarch to call annual Parliaments, but they did make it very difficult for the monarch to exercise power without the aid of Parliament. The Revolutionary doctrine of parliamentary supremacy and the accompanying eighteenth-century rise of cabinet government and ministerial responsibility to Parliament⁸⁴ were the consolidation of these gains, and they inaugurated the modern British political system. But even after the advent and consolidation of parliamentary supremacy, Parliament continued to appropriate funds “with great minuteness,”⁸⁵ and violations of those appropriations are criminally punishable.⁸⁶ As Maitland put it, drawing together once again the two threads we have been discussing, “[E]ven at a pinch money appropriated to the navy cannot be applied to the army.”⁸⁷ While monarchs would continue to—and indeed still today continue to—have certain sums appropriated to their personal and household use (long called the “civil list,” and recently renamed the “Sovereign Grant”), these sums are granted by Parliament and are distinct from, and cannot be supplemented by, other taxpayer revenue.⁸⁸ The Revolution Settlement made clear that just as

Parliament must consent to the raising of funds so too it must consent to how, specifically, they are to be spent.

As we saw in the Introduction, seventeenth-century relations between Crown and Parliament made a big impression on the American colonists. It is, then, unsurprising that, in conjunction with the taxation power,⁸⁹ the colonial assemblies asserted a robust power of appropriation over all of the tax revenue they raised.⁹⁰ Indeed, despite the “extensive precautions” that officials in London took “to prevent that power from falling into the hands of the lower houses,”⁹¹ Jack Greene found that, by the middle of the eighteenth century, the appropriations power wielded by the lower houses of colonial assemblies was “greater even than that of the British House of Commons.”⁹² This was because the colonial assemblies, in addition to strictly appropriating funds, maintained a substantial auditing power.⁹³

Indeed, some colonial assemblies even successfully asserted the right to appropriate money without the approval of the royal governor or his council.⁹⁴ Consider the “Wilkes Fund Controversy” in South Carolina. In 1769, that colony’s House of Commons voted a £1,500 grant to the Society of the Gentlemen Supporters of the Bill of Rights in London.⁹⁵ The society was what we would today call a legal defense fund for John Wilkes,⁹⁶ who was a major thorn in the side of the London government and a cause célèbre among English radicals and American colonists alike (and who is discussed in greater detail in chapter 7).⁹⁷ When imperial authorities got word of the grant, they immediately instructed the royal governor in South Carolina to withhold royal assent from any revenue bill that did not specifically appropriate the money that it raised to *local* matters (that is, not funding enemies of the ministry in London); they also instructed that all revenue bills were to contain a provision levying significant penalties upon the treasurer if he disbursed any further money on the authority of the lower house alone.⁹⁸ The South Carolinians were outraged and responded with both a formal protest from the Commons and an increase in pro-Wilkes editorials and demonstrations.⁹⁹ The Commons also issued a report rejecting the instruction that money could be appropriated only to local purposes.¹⁰⁰ The resulting impasse between the assembly and royal officials consumed South Carolina politics until the breakout of the Revolution mooted the point.¹⁰¹ Indeed, so all-consuming was the controversy that “[n]o annual tax bill was passed in South Carolina after 1769 and no legislation at all after February 1771. For all practical purposes royal government in South Carolina broke

down four years earlier than it did in any of the other colonies.”¹⁰² It is important to note the radicalism of the colonists’ claim here: the Crown had not claimed any right to appropriate money on its own, nor had it denied that the assembly could attach detailed appropriations provisions to its revenue bills. The principle of legislative appropriation was sufficiently firmly established by this point that no one dared to deny it. All the Crown had insisted was that the consent of the governor and the council was *also* necessary in order to appropriate money. It was the lower house’s resistance to *sharing* its appropriating power that brought the functions of the South Carolina colonial government to a halt and caused an early end to royal authority in the colony.

Moreover, it was not simply in the granting of appropriations that colonial assemblies clashed with royal officials. The assemblies were also prepared to withhold funds when they did not like the direction of royal government. As early as the late 1670s, “foot-dragging on appropriations and other bills became a favored tactic in the burgesses’ struggles” with royal governors in Virginia.¹⁰³ In 1685, in the midst of a conflict with royal governor Baron Howard of Effingham over the details of an urban development bill, the House of Burgesses refused to pass an appropriations bill in an attempt to force Effingham’s hand. The governor responded by proroguing the assembly.¹⁰⁴ Similarly, in 1720 the Massachusetts assembly, in the course of a fight with Crown officials in the colony, refused appropriations for the customary celebrations of the king’s birthday, accession, and coronation. Perhaps more cruelly, in Herbert Osgood’s telling, “[t]he semi-annual appropriation of the governor’s salary was postponed until the close of the session and then it was reduced by one hundred pounds, though the depreciation of the currency in which it was paid was already great and was steadily increasing. The small grant to the lieutenant governor was also cut down to such an insignificant sum that he returned it in disgust.”¹⁰⁵ Two years later, when the commanding officer of the royal army in the colony did not follow the Massachusetts assembly’s orders, it refused to vote him any pay and thereby “compelled his discharge.”¹⁰⁶ In 1734, the South Carolina House of Commons, angry that the royally appointed chief justice had sided with the royally appointed governor in a dispute with the legislature, provided no salary at all for the chief justice.¹⁰⁷ The only response available to the Crown in such circumstances was to find another way to pay its officers—in 1735, the Crown began paying the chief justice’s salary out of its own funds.¹⁰⁸ Indeed, in order to avoid assembly domination of Crown officials, the Crown

used imperial revenues to pay its officers in a number of colonies,¹⁰⁹ leading to the Declaration of Independence's complaint that the king "has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."¹¹⁰ Even so, the colonial assemblies pulled what purse strings they did have: in 1751, the South Carolina House of Commons refused to pay the rent on the governor's house "because he had vetoed several of its favorite bills."¹¹¹ This use of the appropriations power to withhold the salaries or perks of royal officials was a strategy employed by assemblies across a number of colonies throughout the colonial period.¹¹² The power of colonial assemblies to appropriate—including their power to *refuse* to appropriate—thus provided significant leverage in policy disputes.

The Continental Congress under the Articles of Confederation had neither an executive to speak of (the "president" being nothing more than the presiding officer of the Congress)¹¹³ nor much by way of revenue (it could only requisition money from the states, not levy taxes itself, and the states proved stingy).¹¹⁴ Nevertheless, the Articles specifically allocated to Congress the power to appropriate money "for defraying the public expenses," so long as the delegations from at least nine states approved the appropriation.¹¹⁵ And, indeed, we see the Congress appropriating specific sums for everything from buying "good muskets"¹¹⁶ to reimbursing for troops' clothing that was "taken by the enemy"¹¹⁷ to building "a federal town."¹¹⁸

At the time the American Constitution was drafted, seven state constitutions contained explicit provisions requiring appropriations by the legislature,¹¹⁹ and nine states (including four that did not explicitly require legislative appropriations) provided that the state treasurer would be appointed by the legislature.¹²⁰ Given that the governments of Connecticut and Rhode Island were still operating under their seventeenth-century royal charters, this means that only one state that drafted a constitution between independence and the drafting of the federal Constitution, Georgia, did not include some explicit mechanism of legislative control over appropriations. The Georgia Constitution did, however, provide that "[e]very officer of the State shall be liable to be called to account by the house of assembly."¹²¹ And when constitutional revisions in the late 1790s made the office of the Georgia governor more powerful, an explicit appropriations provision was added to the 1798 state constitution.¹²² Gerhard Casper, summarizing the early republican state constitutions as a whole, concluded that they "confirm our understanding that during the founding period

money matters were primarily thought of as a legislative prerogative.¹²³ On the specific issue of appropriating the salaries of state officers, the states were split: some, like Massachusetts and South Carolina, required fixed salaries for both the governor and judges;¹²⁴ other states had no such provision. New Hampshire, in adjacent provisions, drew a clear distinction between the two types of office: “Permanent and honorable salaries shall be established by law for the justices of the superior court,”¹²⁵ but “[t]he president and council shall be compensated for their services from time to time by such grants as the general court shall think reasonable.”¹²⁶

As we have seen, it was a favorite practice of the Stuart monarchs to rule without Parliament whenever they came to find parliamentary interference with their plans tiresome. In addition to the English Bill of Rights’ requirement of frequent parliaments, the post-Revolutionary Parliament also kept the Crown dependent by moving much more heavily toward annually granted and specifically appropriated supply. The U.S. Constitution adopts a similar set of strategies. In place of the English Bill of Rights’ admonition that “parliaments ought to be held frequently,”¹²⁷ the American Constitution substitutes the more specific requirement that Congress assemble at least once per year.¹²⁸ The desire to control how money is spent, which we saw growing during the late Stuart period, coming to maturity in the eighteenth century, and asserted emphatically in colonial and early republican America, found its expression in the requirement—wholly uncontroversial at the Constitutional Convention¹²⁹—that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”¹³⁰ The concern with auditing the books is familiar, too; it had been clear for centuries that appropriations were ineffectual without some means of ensuring that the money was actually spent for the purposes for which it was appropriated. The Constitution also speaks to the issue of governmental officials’ salaries: it prohibits presidential salaries from being altered during a presidential term, judicial salaries from being diminished, and (in an amendment proposed in 1789 but not ratified until 1992) congressional salaries from “varying” until after the next election,¹³¹ but it does not otherwise prevent officers’ salaries from being reduced.

The Constitution moreover evinces discomfort with standing armies, a discomfort which we saw as early as the reign of Charles II and which appears

in the Declaration of Independence and in the republican constitutions of both Maryland and Virginia.¹³² Although the duration of most appropriations is not limited, the Constitution does specify that “no Appropriation of Money” for the purpose of “rais[ing] and support[ing] Armies . . . shall be for a longer Term than two Years.”¹³³ This is, in some sense, a parallel to what the English Parliament accomplished with the Mutiny Act: if the king or the president wants to keep a standing army in the field, he will have to negotiate with Parliament or Congress about it on a regular basis.¹³⁴ And, like the Mutiny Act, the American Constitution is concerned specifically with *armies*, not navies. Hence, the neighboring clause, which allows Congress to “provide and maintain a Navy,” places no time limit on naval appropriations.¹³⁵ The Third Amendment, which forbids the nonconsensual peacetime quartering of “Soldier[s],” not sailors, evinces a similar concern.¹³⁶ The reason sounds in domestic liberties: standing armies could be used to oppress the people and rule with an iron fist. In contrast, the navy was traditionally understood to face outward, serving to defend the political community from external threats and, less exaltedly, to engage in imperial expansion. In Blackstone’s words, the navy serves as “the floating bulwark of the island . . . from which, however strong and powerful, no danger can ever be apprehended to liberty.”¹³⁷ Madison, writing as Publius, echoed the sentiment, insisting that “our situation bears [a] likeness to the insular advantage of Great Britain. The batteries most capable of repelling foreign enterprises on our safety are happily such as can never be turned by a perfidious government against our liberties.”¹³⁸

Indeed, the separation of purse and sword was the Federalists’ strongest rejoinder to Anti-Federalist fears of a tyrannical president. When Patrick Henry worried that “Your President may easily become king. . . . The army is in his hands, and . . . the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master,”¹³⁹ Madison answered by pointing to the fact that “[t]he purse is in the hands of the representatives of the people. They have the appropriation of all moneys.”¹⁴⁰ Hamilton likewise told the New York ratifying convention that “where the purse is lodged in one branch, and the sword in another, there can be no danger.”¹⁴¹ Indeed, throughout the ratification debates, we see the Federalists’ using congressional control over appropriations as a rejoinder to fears about presidential military might.¹⁴²

Once the Constitution was ratified, one of the first tasks of the new Congress was setting up the three major departments of government—those of foreign

affairs, war, and the treasury. As Casper has noted, the Treasury was singled out for special treatment.¹⁴³ The organic statutes for both the Foreign Affairs Department and the War Department explicitly termed them “Executive department[s],” provided that the secretary was to carry out “such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States,” and created only a skeletal organization, consisting of a secretary and a chief clerk.¹⁴⁴ The organic statute for the Treasury Department, by contrast, did not refer to it as an “executive” department and specifically provided for the appointment of a comptroller, an auditor, a treasurer, a registrar, and an assistant to the secretary, in addition to the secretary himself.¹⁴⁵ Most strikingly, the duties of these various officers mention nothing about taking direction from the president; however, the duties of both the secretary and the treasurer specifically require them to report to the houses of Congress.¹⁴⁶ The First Congress, in Casper’s words, seems to have viewed the secretary of the treasury as “an indispensable, direct arm of the House in regard to its responsibilities for revenues and appropriations.”¹⁴⁷

Notwithstanding the fact that the text of the Constitution allows for indefinite appropriations in all contexts other than the army, the practice from the beginning of the Republic has largely been one of annual appropriations. The nation’s very first appropriations bill authorized the expenditure of sums not exceeding \$639,000 “for the service of the present year.”¹⁴⁸ Subsequent early appropriations bills followed suit.¹⁴⁹ These earliest appropriations laws, which essentially tracked estimates submitted to Congress by Treasury Secretary Alexander Hamilton,¹⁵⁰ were very brief and not very specific. Indeed, the first one divided that \$639,000 into only four categories: the civil list (not more than \$216,000), the War Department (not more than \$137,000), the discharging of “warrants issued by the late board of treasury” (not more than \$190,000), and pensions to invalids (not more than \$96,000).¹⁵¹ The second annual appropriations act, for 1790, introduced several innovations. Although it once again divided the total (just over \$394,000) into broad categories (this time, only three: the civil list, the War Department, and invalid pensions), it incorporated by reference Hamilton’s estimates, so that, for example, the civil list appropriation reads: “A sum not exceeding one hundred and forty-one thousand, four hundred and ninety-two dollars, and seventy-three cents, for defraying the expenses of the civil list, as estimated by the Secretary of the Treasury, in the statement annexed to his report made to the House of Representatives on the ninth day of January

last. . . .¹⁵² The law also provided President Washington with a slush fund—up to \$10,000 “for the purpose of defraying the contingent charges of government”—but required that he report how he spent that money to Congress at the end of the year.¹⁵³

By the time we get to the mid-1790s, increasing tensions between the nascent Federalist and Jeffersonian factions led to an increase in the specificity of appropriations legislation.¹⁵⁴ In 1793, Representative William Branch Giles of Virginia introduced a series of resolutions censuring Hamilton for alleged violations of specific appropriations provisions.¹⁵⁵ The resolutions were handily defeated; it was not clear that Hamilton actually had violated the terms of the appropriations, and even if he had, the offense was minor—even Albert Gallatin, the staunch Republican financial expert, later wrote that Hamilton’s transgression had been “rather a want of form than a substantial violation of the appropriation law.”¹⁵⁶ Gallatin, however, remained a strong champion of legislative control over appropriations. As a freshman representative in 1795, he successfully pressed the House to lessen its reliance on the secretary of the treasury by establishing a Committee on Ways and Means that could develop its own expertise over matters of taxing and spending.¹⁵⁷ He also fought, with some success, for more specific and restrictive language in appropriations laws.¹⁵⁸ Gallatin would go on to be the United States’ longest-serving secretary of the treasury, holding the post for the entire Jefferson administration and most of the Madison administration. In 1809, Gallatin helped shepherd through Congress a law specifying that all warrants drawn upon the Treasury “shall specify the particular appropriation or appropriations to which the same shall be charged” and that “the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other.” The sole exception was a provision allowing the president, during a congressional recess and only upon the application of a department head, to move money appropriated for one purpose to another purpose within the same department.¹⁵⁹

It is true that some presidents, starting with George Washington in his response to the Whiskey Rebellion in 1794, have spent money without congressional appropriations in response to emergencies. But, as Richard Rosen has noted, the presidents who have done so have not claimed to be acting legally. Rather, they acknowledged their actions to be *ultra vires*, justified only by necessity, and they sought post hoc congressional authorization. Moreover,

they have faced serious congressional scrutiny and criticism when they have done so.¹⁶⁰

The nineteenth century would see two significant framework statutes meant to consolidate congressional control over appropriations.¹⁶¹ The 1849 Miscellaneous Receipts Statute requires, with some exceptions, that all money coming into the federal government be paid into the Treasury,¹⁶² so that departments could not place incoming funds into special accounts beyond congressional control. In 1870, in response to an increase in “coercive deficiencies”—situations in which an executive department created obligations in excess of appropriations, thus putting substantial moral pressure on Congress to make good on the departments’ promises¹⁶³—Congress passed the Anti-Deficiency Act, which made it illegal for “any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.”¹⁶⁴ In response to continuing evasions, the 1905 Anti-Deficiency Act expanded the prohibition to “any contract *or obligation* for the future payment of money in excess of . . . appropriations.” It prohibited any governmental department from accepting any voluntary service not authorized by law, except “in cases of sudden emergency involving the loss of human life or the destruction of property.” It also required agencies to apportion their appropriations over the course of the year so as to prevent them from spending all of their money at the beginning of the year and then coming to Congress for more. Finally, it provided that any officer violating the act’s terms would be summarily removed from office and could face fines or imprisonment.¹⁶⁵

From this historical sketch up to the beginning of the twentieth century, we can trace a few enduring themes in the battle for appropriations power. First, and most basically, is the question of *who* has the power to determine how public moneys will be spent. The Revolution Settlement cemented the transfer of that power from the Crown to Parliament in the mother country; appropriations control became a bone of contention between the Crown and the restive North American colonies in the eighteenth century; and the Constitution, in no uncertain terms, requires that appropriations be made by law. Even so, we have seen political contention over how specific those appropriations should be. And this leads us to the second theme: *What* exactly is contained in the appropriations power? Should appropriations statutes simply provide broad outlines and sum totals, or should they involve minute details? Should military expenditures

be treated differently from other types? And how intermingled should appropriations decisions be with substantive policy decisions? In particular, we have seen a variety of different approaches to the question of the extent to which it is permissible to reduce or zero-out an official's salary. Finally, there is the question of *when* appropriations happen. As we have seen, when the Crown's "ordinary" sources of revenue covered the vast majority of its expenses, appropriations were infrequent. Hereditary sources of revenue provided no opportunity for parliamentary involvement, and life grants did not provide much more. The shift to regular appropriations—beginning in earnest during the Restoration, accelerating dramatically after the Glorious Revolution, and always the case in the United States—was a significant one, but (with the exception of spending on the army) the U.S. Constitution is silent on the duration of appropriations.

Each of these issues has been the subject of significant constitutional contention because, as we shall see in the remainder of this chapter, each has wide-ranging constitutional implications.

The Structural Significance of Annual Appropriations

Consider first the timing of appropriations. Specific annual appropriations serve much the same function as sunset provisions in substantive legislation: both reset the legislative baseline.¹⁶⁶ Consider the following simple example: At time t_1 , Congress passes a law delegating a certain amount of power to an executive-branch agency. If that law has no sunset provision, then, in order to take that power back at time t_2 , Congress would need to pass a second law—which, of course, would require either presidential concurrence or two-thirds supermajorities in both chambers.¹⁶⁷ But the t_1 law empowers executive-branch actors (that is, the administrative agency) and thereby empowers the president, so it is unlikely that the president would consent to giving that power back. Under this scenario, Congress is likely stuck with the t_1 law. But now imagine that Congress had included a sunset provision, so that at t_2 , the delegation ceases to have any legal force. Inaction now favors congressional power; only if the House, Senate, and president once again agree to delegate the power will the executive be able to exercise it at t_2 . This, of course, is precisely why Parliament in 1689 included a sunset clause in the Mutiny Act, and it is why Congress in 2001 included a sunset provision in the PATRIOT Act.¹⁶⁸ (It also explains why the Bush administration opposed the PATRIOT Act's sunset provision.)¹⁶⁹

An appropriations provision can be understood simply as a specific delegation of spending authority. A long-term or indefinite appropriation significantly increases executive power. So long as the president is happy with the appropriation, she need only veto any attempt to change it. An annual appropriation, however, resets to zero in the absence of congressional action and thereby forces the president to negotiate with Congress each year, just as post-Glorious Revolution monarchs were forced to negotiate annually with Parliament. Thus, the larger the percentage of the budget that is subject to annual appropriations, the more bargaining chips Congress has at its disposal.

It is, then, interesting to note that the percentage of the federal budget subject to annual appropriations has been steadily declining for some time. The federal budget now consists of two essential components: mandatory spending and discretionary spending. Mandatory spending (also called “direct spending”) “involves a binding legal obligation by the Federal Government to provide funding for an individual, program, or activity.”¹⁷⁰ Once mandatory spending has been authorized, “eligible recipients have legal recourse to compel payment from the government if the obligation is not fulfilled.”¹⁷¹ Mandatory spending is precisely that spending that does not require annual appropriations. It is authorized in perpetuity, unless a new law is passed revoking it. The major elements of mandatory spending are entitlements and interest payments on debt.¹⁷² All other spending—including the funding for all federal agencies—is discretionary¹⁷³ and requires annual appropriations. For the 2016 fiscal year, 69 percent of the federal budget consisted of mandatory spending,¹⁷⁴ reflecting a long-running trend of growth in the percentage of the federal budget devoted to mandatory spending.¹⁷⁵ In other words, for 69 percent of the federal budget, Congress has ceded the institutional advantage of annual appropriations¹⁷⁶ and surrendered the institutional gains of 1689.

Moreover, even in the realm of discretionary spending, Congress has ceded the first-mover advantage to the president. As we have seen, in the earliest years of the Republic, Congress heavily deferred to Hamilton’s spending priorities and estimates. But with the rise of partisan competition, the House began to take a more active, specific role, including the 1809, 1849, and 1870 statutes discussed above. Indeed, when President Taft in 1912 submitted a proposed budget to Congress, Congress simply ignored it and went about preparing its own budget.¹⁷⁷ But the growth of the regulatory state put pressure on the fragmented manner in which Congress went about budgeting,¹⁷⁸ and the era of

“legislative dominance” of the budget process¹⁷⁹ came to an end shortly after World War I. Under the 1921 Budget and Accounting Act,¹⁸⁰ the president kicks off the annual appropriations process by submitting a budget proposal to Congress.¹⁸¹ Of course, Congress could always depart from the president’s proposal, but it is nevertheless the president’s proposal that serves as the starting point for negotiation and therefore exerts a disproportionate impact on the subsequent process.¹⁸² Furthermore, the 1921 act created the Budget Bureau in an effort to foster administrative coordination and centralization in budgetary matters. Although the Budget Bureau was initially located in the Treasury Department, its leadership from the beginning reported directly to the president.¹⁸³ When the Executive Office of the President was created in 1939, the bureau was moved into it,¹⁸⁴ and in 1970, it was renamed the Office of Management and Budget (OMB).¹⁸⁵ Throughout its history, the bureau/OMB has proven remarkably effective in centralizing and consolidating presidential control over the various component parts of the administrative state.¹⁸⁶ Congress was not wholly inattentive to the ways in which the 1921 act empowered the president: the act also created the General Accounting Office (GAO) as an independent agency headed by the comptroller general with the authority to investigate the receipt and spending of federal funds and report to both the president and Congress.¹⁸⁷ Moreover, at almost exactly the same time, both houses gave exclusive jurisdiction over appropriations legislation to their Appropriations Committees, thus creating a single power base in each chamber with appropriations expertise that might push back against the White House.¹⁸⁸ Still, the overall effect of these measures was clearly to inaugurate an era of “presidential dominance” of the budget process.¹⁸⁹

In the mid-1970s, in the context of the Watergate scandal and the deepening distrust of the presidency it engendered, Congress began to push back against this executive budgetary dominance. A series of minor challenges—including exempting certain agencies from OMB review and instead having them send their budget requests directly to Congress, successfully pressuring the White House to turn over raw estimates in addition to a completed budget proposal, and requiring Senate confirmation of OMB leadership¹⁹⁰—were prelude to the more sweeping changes in the Budget Act of 1974, signed into law less than a month before Nixon’s resignation.¹⁹¹ This act created the Budget Committees in both houses of Congress, as well as the Congressional Budget Office, in an attempt to provide counterweights to budget expertise at OMB. It also created

the process by which the two houses pass a Budget Resolution to guide the appropriations process—a counterweight to the budget proposal submitted by the president.¹⁹² Several subsequent statutes have created procedural mechanisms designed to limit budget deficits, but the essential structure of the budget process remains that of the combined 1921 and 1974 acts.¹⁹³

The other big budgetary fight leading up to the 1974 act was over “impoundment,” the refusal by the president to spend appropriated funds. Of course, Congress has the ability to authorize the expenditure of “up to” a certain amount, and, as we have seen, the nation’s earliest appropriations bills authorized the expenditures of “sum[s] not exceeding” certain amounts for certain purposes. (Indeed, the example that is sometimes cited as the first instance of impoundment—President Jefferson’s 1803 announcement to Congress that he would not spend an appropriated \$50,000 for gunboats on the Mississippi because the recent “favorable and peaceful turn of affairs” rendered them unnecessary¹⁹⁴—was in fact an instance of presidential adherence to an appropriation authorizing the expenditure of “a sum not exceeding fifty thousand dollars” for the purchase of “a number not exceeding fifteen gun boats.”)¹⁹⁵ But what about when the statute does not include such permissive language? Presidents had long taken the position that, in the words of Judson Harmon, attorney general to Grover Cleveland, appropriations are “not mandatory to the extent that you are bound to expend the full amount if the work can be done for less.”¹⁹⁶ Such “routine impoundments” have generally been uncontroversial.¹⁹⁷

More controversial have been “policy impoundments”—refusals to spend appropriated funds because the president disagrees with the policies to be pursued by such expenditures. Policy impoundments did not begin in any significant degree until World War II; Presidents Franklin Roosevelt, Truman, Eisenhower, Kennedy, and Lyndon Johnson all made use of them to a limited extent.¹⁹⁸ But there is consensus among observers that the Nixon administration engaged in the practice on such an expanded scale as to constitute a difference in kind, not simply in degree.¹⁹⁹ Allen Schick estimates that Nixon impounded approximately \$18 billion,²⁰⁰ and he was frequently unable to convince Congress to come to an agreement to cancel the appropriations.²⁰¹ Several would-be recipients of impounded funds filed lawsuits, and in 1975 the Supreme Court, in *Train v. City of New York*, unanimously held that the Environmental Protection Agency was required to disburse the full amount authorized under the Federal Water Pollution Control Act Amendments of 1972, notwithstanding

the president's order to the agency's administrator to disburse less money.²⁰² A series of lower-court decisions, dealing with impoundment of other funds, likewise found the impoundments impermissible.²⁰³

Congress also reacted swiftly. Title X of the 1974 Budget Act, commonly known as the Impoundment Control Act,²⁰⁴ created two tightly controlled kinds of impoundment authority: rescission, which meant that the president did not wish to spend the funds at all, and deferral, which meant that he wanted to delay spending them. In both cases, the president was required to send a message to Congress laying out his reasons and supporting evidence. For rescissions, the funds could then be withheld for forty-five days; if at the end of that period both houses had not passed a "rescission bill"—that is, a joint resolution rescinding the spending in accordance with the president's wishes—then the president was obligated to spend the funds.²⁰⁵ Deferrals were automatically effective, but the funds had to be released if either house adopted a resolution of disapproval.²⁰⁶ In the aftermath of the Supreme Court's decision in *INS v. Chadha*,²⁰⁷ invalidating legislative vetoes (about which, more in a few pages), a court held that the entire section of the act dealing with deferrals was invalid.²⁰⁸ Congress soon amended the statute to allow for deferrals without the possibility of congressional override, but only in three tightly constrained situations: "to provide for contingencies"; "to achieve savings made possible by or through changes in requirements or greater efficiency of operations"; or "as specifically provided by law."²⁰⁹ When its procedural ability to check deferrals was removed, Congress therefore responded by creating tighter substantive constraints on the deferral mechanism.

The Impoundment Control Act's checks have generally been effective, with studies finding that presidents have largely adhered to the act's requirement to report impoundments and that presidents have released funds when required to.²¹⁰ Moreover, presidential rescission proposals have been routinely rebuffed—between January 1983 and January 1989, Congress rejected 76 percent of Reagan's rescission requests, accounting for 98 percent of the funds that Reagan sought to impound.²¹¹ Even under unified government, rescission bills were no guarantee—Congress refused to pass them 29 percent of the time during the Carter administration (accounting for 31 percent of the funds that Carter sought to impound), despite Democratic control of both houses.²¹² A detailed study of rescission requests during the first year and a quarter of the act's existence—which was also the first year and a quarter of the Ford administration, with both

houses of Congress under Democratic control—found that Congress generally approved “routine rescissions involving no change in government policy,” while generally rejecting those that sought to accomplish some other policy objective.²¹³ Thus, the impoundment control provisions of the 1974 act, like its provisions structuring the congressional budget process, have been at least somewhat successful in their aim to counterbalance and constrain executive budgetary authority, as it had been growing since the 1921 act. (Whether they are successful in controlling deficits is another matter. In an attempt to reduce the deficit in the mid-1990s, the Republican-controlled Congress passed, and President Clinton signed into law, an enhanced presidential rescission power, the line-item veto.²¹⁴ Two years later, the Supreme Court struck it down.)²¹⁵ As several commentators have noted, the creation of these counterweights has “institutionalized and expanded budgetary conflict.”²¹⁶ And this increased budgetary capacity gives Congress more power to affect non-fiscal policy.

Spending Authority as Substantive Authority

Indeed, it is a mistake to think about the congressional power of the purse solely in terms of Congress’s power to determine spending levels. Control over spending also provides Congress with significant leverage to use in negotiations over other policies, leverage that we have already seen Parliament and colonial assemblies put to good use. Madison, writing as Publius, had such leverage in mind when he wrote that the “power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”²¹⁷ As Charles Black colorfully put it, “[B]y simple majorities, Congress could . . . reduce the president’s staff to one secretary for answering social correspondence, and . . . , by two-thirds majorities, Congress could put the White House up at auction.”²¹⁸ Along the same lines, Congress could presumably eliminate the salaries of judicial clerks and secretaries or even (most cruelly of all) cut the Supreme Court’s air conditioning budget.²¹⁹ Indeed, as we have seen, refusing to pay the salaries of Crown officers and judges was a venerable tradition in the American colonies. The president himself,²²⁰ like federal judges,²²¹ is protected against salary diminution, but the Constitution

provides no other government official such protection, nor does it explicitly protect any other form of spending.

It is certainly not unknown for Congress to attach specific riders to appropriations measures forbidding the use of funds for specific purposes. As one observer complained at the end of the Reagan administration, “Congress discovered that it could intimidate the executive branch by uttering again and again the same seven words, ‘Provided, that no funds shall be spent. . . .’”²²² Of course, this “discovery” was hardly new to the 1980s—Congress had been prohibiting the use of funds for specific purposes (including for specific salaries) since the early days of the Republic. For example, an 1810 law, signed by President Madison, provided that certain diplomatic officials, in order to be entitled to their salary, had to have been confirmed by the Senate, even though no substantive legislation actually *required* that these officials be confirmed by the Senate.²²³ Such provisos, whether dealing with salaries or other forms of spending, became increasingly popular as the bureaucracy grew.²²⁴ Indeed, this power has on occasion been used to zero-out the salaries of specific officials or categories of officials.²²⁵ To take just one small example, an 1869 law provides that “no salary shall hereafter be allowed the marshal at” the Bangkok consulate.²²⁶ Critics of the practice charge that it violates separation-of-powers principles by allowing Congress to interfere in the internal functioning of the executive or judicial branches,²²⁷ but these criticisms presuppose that the allocation of power to each branch is static and predetermined. Understanding the interbranch allocation of powers as something that is continually being worked out through constitutional politics, by contrast, brings us to a very different view of Congress’s authority to zero-out specific programs or officials’ salaries: it is simply another one of the tools by which Congress can press for decision-making authority in substantive areas. (The Supreme Court weighed in on this topic in the 1946 case of *United States v. Lovett*,²²⁸ striking down a provision forbidding the use of any government funds to pay the salaries of three named individuals who some members of Congress believed were Communist “subversives.” Emphasizing that this was no “mere appropriation measure” and that the plaintiffs had been singled out “because of what Congress thought to be their political beliefs,”²²⁹ the Court held the provision to be an unconstitutional bill of attainder. Given the traditional scope of the congressional power of the purse, *Lovett* is most sensibly read as a narrow decision pushing back against the McCarthyite punishment of individuals for political beliefs unrelated to the

scope of their government duties, not as a broader limitation on Congress's power to attach defunding riders to appropriations bills.)²³⁰

Of course, perhaps Charles Black was wrong—perhaps simple majorities could not reduce the president's staff to a single social secretary because the president would veto any such appropriations bills. There would be an element of perversity in that: by doing so, the president would shut down (at least part of) the government, thereby reducing his staff to zero (or, more precisely, to only those personnel deemed "essential" and thus allowed to donate their time under the Anti-Deficiency Act).²³¹ But he would be banking on winning the ensuing public relations struggle, thereby forcing Congress (eventually) to back down and restore his full staff. Perhaps a president would even be willing to veto an appropriations bill simply because it zeroed-out the salary of one of his favored subordinates. After all, government shutdowns and near shutdowns are not entirely unknown in our system of government, with various policy disagreements motivating budgetary standoffs. For instance, after the 1878 elections gave Democrats control over both houses of Congress for the first time since the Civil War, they insisted on appropriations riders repealing Reconstruction-era laws protecting the exercise of the franchise and therefore the political power of the freedmen (and hence the Republicans) in the South.²³² President Hayes vetoed four separate appropriations bills in his insistence not to accept the riders.²³³ The Democrats had miscalculated, however, and Hayes's public standing grew with each veto.²³⁴ Eventually, the Democrats gave in and passed appropriations bills without the offending riders, with only days to spare before a shutdown. (Indeed, one part of the government did shut down—Hayes's final veto in the conflict was of a rider-laden appropriations bill for federal marshals, and Congress adjourned without passing a clean one.)²³⁵ Although Hayes kept his promise to serve only one term, the conflict worked to the Republicans' advantage, with Garfield winning the presidency in 1880 and Republicans retaking control of both houses.

More recently, the federal government has shut down eighteen times since 1976, with some shutdowns as brief as a day and one as lengthy as three weeks.²³⁶ In 1995 and 1996, the federal government shut down twice—once for less than a week and then again for three weeks—when President Clinton and the Republican-controlled Congress (led by Speaker Newt Gingrich) were unable to agree on a budget.²³⁷ While Congress was the clear institutional loser in the 1995–1996 government shutdowns,²³⁸ it would be a mistake (albeit a

common mistake)²³⁹ to infer from this example that Congress inevitably loses out in government shutdowns. The lesson of 1995–1996 was, rather, that a government shutdown throws interbranch conflict into sharp relief, increasing the public salience—and therefore the political stakes—of the fight. This dynamic presents both opportunities and pitfalls for Congress and the president alike. As Leon Panetta, the White House chief of staff during the 1995–1996 shutdowns, put it, “[I]t was a day-to-day crisis, and you never quite knew what the hell was going to happen.”²⁴⁰ A historian of the period concurs: “It was a high-risk gamble for both sides. No one really knew how the public would react.”²⁴¹ Indeed, news accounts during the shutdowns made it clear that the president was at risk both of losing in the public arena and of losing enough Democratic votes in Congress that his veto could no longer be sustained.²⁴² But, as several commentators have noted, Gingrich made both tactical mistakes, such as personalizing the fight and thereby appearing petty,²⁴³ and strategic ones, such as overreading his mandate to press for conservative fiscal policy.²⁴⁴ Had he been more skilled, or had Clinton been less so, we might well remember the 1995–1996 budget showdown as a win for Congress. But to the extent that Congress internalizes the narrative that it is bound to lose any budget showdown with the White House, it correspondingly lessens its bargaining power.

Indeed, the contrast between two recent budget showdowns pitting the Obama administration and the Democratic-controlled Senate against the Republican-controlled House of Representatives is illuminating. The 2010 midterm election was a good one for the Republican Party, giving it control of the House by a comfortable margin and significantly narrowing the margin in the Senate; President Obama referred to it as a “shellacking” for Democrats.²⁴⁵ House Republicans, led by Speaker John Boehner, claimed a mandate for a decidedly more conservative agenda than had predominated over the previous two years.²⁴⁶ Because no budget for fiscal year 2011 had ever been completed, the government was being funded by a series of short-term continuing resolutions.²⁴⁷ This meant that the new Republican House majority had an early crack at the budget.

By credibly threatening to allow the government to shut down, the House Republican leadership was able to bargain for a great deal of what it wanted.²⁴⁸ Not only did House Republicans successfully negotiate for more than \$38 billion in spending cuts that were opposed by the White House, they also used their budget power as leverage to achieve changes they sought in areas as

diverse as environmental law, education policy, and abortion access.²⁴⁹ They even took the opportunity to intervene in a separation-of-powers controversy, prohibiting the expenditure of funds for certain White House “czars.”²⁵⁰ Clearly, the House in this instance was able to use its power of the purse as a potent weapon in interbranch struggle.

By contrast, the 2012 election was a good one for the Democrats. Obama was handily reelected, and, despite having to defend more seats than the Republicans, the Democrats increased their margin in the Senate. Although they did not retake the House, they narrowed the Republicans’ margin of control.²⁵¹ Because of the centrality of fiscal issues in the campaign, Democrats could plausibly claim a mandate for their positions on taxing and spending.²⁵² Indeed, in the immediate aftermath of the election, the lame-duck Congress passed a fiscal compromise that was largely favorable to Democratic priorities.²⁵³ But as the next Congress progressed, Republicans became emboldened and sought to use the threat of a government shutdown as leverage in an attempt to secure significant changes in, if not outright repeal of, the Affordable Care Act. This time, Obama and Senate Democrats refused to compromise, and the government shut down on October 1, 2013. The Affordable Care Act was indeed unpopular, but even before the shutdown began, polls showed Americans overwhelmingly opposed shutting down the government in an attempt to secure changes to the law.²⁵⁴ The shutdown hurt the approval ratings of everyone involved, but congressional Republicans bore the brunt of it, with their poll numbers continuing to slide throughout the sixteen-day shutdown.²⁵⁵ With the stock market taking a hit²⁵⁶ and key conservative interest groups and opinion leaders abandoning the Republican position,²⁵⁷ House Republicans backed down and reopened the government almost entirely on Democrats’ terms.²⁵⁸ Presumably eager to avoid making the same tactical mistake again—and eager to focus on issues more advantageous to them, especially the glitch-laden launch of the Affordable Care Act’s website—Republicans agreed in December 2013 to a two-year budget resolution with spending levels above the previous baseline, precisely the sort of deal that they had previously resisted.²⁵⁹ In late 2015, with Republicans in control of both houses of Congress, they again agreed to a two-year budget resolution with higher spending levels.²⁶⁰

So, what was the difference between 2011, when Republicans used their control of the House to win both their preferred spending levels and significant changes in a variety of substantive policy fields, and 2013, when their effort to

use budgetary power to secure changes in the healthcare law backfired, forcing them to back off their healthcare demands *and* agree to higher levels of spending? In both cases, the Republicans controlled only the House, with the Senate and the presidency in Democratic hands. But, of course, the political contexts were quite different. The 2010 election was, in large part, a repudiation of the previous two years of unified Democratic government. Had the Republicans successfully used the two intervening years to build trust with the voters, they might have captured unified government themselves in 2012. But they did not; instead, the pendulum swung back toward the Democrats. Little wonder, then, that Republicans were able to get a better deal in the politically friendly climate of 2011 than in the politically hostile one of 2013. And by injudiciously picking a budgetary fight over the Affordable Care Act in 2013, the House not only harmed its ability to get what it wanted in the present, it also created a political dynamic in which its best move was to agree to a series of *two-year* budget resolutions, thereby surrendering some of the power that comes with the annual budget process in even-numbered years (although, of course, the crafting of the individual appropriations bills remained an annual affair).

The crucial lesson of these budget fights is not that the president always wins; as 2011 showed, he does not. The lesson is that who wins—which is to say, who has more say in determining the government's spending levels and priorities, and who is able to leverage that budgetary power to gain power over other policy areas—is significantly affected by the artfulness with which the various actors engage in the public sphere. And the artfulness with which political actors exercise the power that they do have, in turn, significantly affects their future public-sphere engagements.

Of course, none of this is limited to the power to *shut down* the government—that is simply the limiting case. The power of the purse is continually exercised in small-bore ways as well, and there, too, the purse strings come with significant substantive power. Although modern appropriations bills usually allocate lump sums to various agencies and departments, those appropriations bills are generally “accompanied by detailed committee reports giving the specific amounts the department or agency should spend on each program within the budget account.”²⁶¹ Given that the appropriations committees retain the power to specify detailed spending levels in the statutory language itself—and given that they retain the power to drastically cut those spending levels in

future years or to attach unpleasant riders—the departments and agencies “treat those committee reports as the equivalent of legislation.”²⁶² As Democratic representative (and chairman of the House Appropriations Committee) David Obey put it in 2009, “For any administration to say, Well, we will accept the money, but ignore the limitations is to greatly increase the likelihood that they will not get the money.”²⁶³ (This was especially noteworthy because the administration that Obey and a number of Democratic colleagues were implicitly threatening was that of a fellow Democrat, Barack Obama.)²⁶⁴ When agencies do wish to “reprogram” funds (in other words, spend funds in ways that are consistent with the legislation but inconsistent with the committee report), they generally report to the relevant appropriations subcommittee and receive permission to do so.²⁶⁵ Moreover, when Congress wishes to express its displeasure about an agency’s performance, a not-so-gentle tug on the purse strings can be quite effective—in fiscal years 2014 and 2015, the budget of the Internal Revenue Service was slashed, which was clearly meant to convey congressional (and especially House Republican) displeasure at the agency’s enhanced scrutiny of the tax-exempt status of certain political groups.²⁶⁶

Such pressures seem generally effective: there is a growing body of evidence suggesting that the federal bureaucracy is broadly responsive to congressional preferences.²⁶⁷ As Morris Fiorina provocatively put it, “Congress controls the bureaucracy, and Congress gives us the kind of bureaucracy it wants.”²⁶⁸ And budgets are one (although, as later chapters indicate, certainly not the only one) of the primary mechanisms by which Congress both directly controls and, perhaps more importantly, signals its priorities to bureaucratic agencies.²⁶⁹ Indeed, the desire to signal to an agency that congressional appropriators intend to keep a close eye on some particular policy area is likely responsible for the continuing popularity of “legislative vetoes,” provisions in delegating legislation that authorize one house of Congress (or sometimes both houses acting jointly, but without presentment to the president) to override some type of agency action. The Supreme Court held legislative vetoes unenforceable in the 1983 case *INS v. Chadha*.²⁷⁰ Nevertheless, between 1983 and 1999, Congress passed more than four hundred laws containing provisions authorizing legislative vetoes.²⁷¹ As Lou Fisher noted in the classic study of this phenomenon, although presidents routinely denigrate legislative-veto provisions in signing statements, “agencies have a different attitude. They have to live with their

review committees, year after year, and have a much greater incentive to make accommodations and stick by them. . . . Agencies cannot risk . . . collisions with the committees that authorize their programs and provide funds.”²⁷² Indeed, as Jessica Korn has noted, when Reagan administration officials initially took *Chadha* as an indication that they could ignore appropriations directives contained in committee reports (but not statutory language), threats from Congress to tie the administration’s hands more explicitly forced them to beat a hasty retreat.²⁷³ Nor is this budgetary pressure limited to the executive branch: Eugenia Toma’s research suggests both that Congress uses the Supreme Court’s budget to signal approval or disapproval of the general thrust of the Court’s rulings and that the Court responds to these signals by bringing its decisions more in line with Congress’s wishes.²⁷⁴

Furthermore, it is not simply the fact or the level of funding that is important; the form that funding takes also has important substantive implications. As Nick Parrillo has meticulously demonstrated, the long nineteenth century saw a large-scale transformation in official compensation, from a fee- and bounty-driven model to a salary model.²⁷⁵ Broadly speaking, this development has two important implications for congressional power. First, the shift from fees paid by the recipients of government services to salaries meant a greater level of congressional control over government officials. After all, pulling the purse strings is only effective to the extent that the officials in question are paid out of the relevant purse; to the extent that they were paid by the recipients of their services, they naturally tended to take a customer-service attitude rather than an attitude governed by congressional priorities—and this was even more so when fees were not only paid by the recipients of government services but actually *negotiated* between the recipient and the provider.²⁷⁶ Salarization allowed Congress, using precisely the types of mechanisms discussed in this chapter, to exert greater control. Second, and relatedly, the transition from fees and bounties to salaries had the effect of shifting officials’ priorities, even when the fees and bounties had been paid by Congress all along. Thus, as Parrillo notes, the late nineteenth-century transition of federal prosecutors from a system of fees for trial (with a bonus for convictions) to a salary incentivized prosecutors to exercise more discretion, allowing some petty illegalities to go unpunished.²⁷⁷ Even holding amounts constant, the form of payment was intentionally used as a tool to influence how prosecutors went about their duties.

Funding, and Defunding, the Military

Finally, let us return briefly to a theme that has run throughout this chapter: the connection between the power of the purse and one of the most potent substantive powers, that of the sword. We have seen the two bound tightly together in the constitutional imagination from the Restoration through the Revolution Settlement, into the New World, and in the constitutional ratification debates. It is worth contemplating briefly the ways in which they interact today.

In 2004, Secretary of Defense Donald Rumsfeld remarked, “You go to war with the Army you have, not [necessarily] the Army you might want or wish to have at a later time.”²⁷⁸ What Rumsfeld might have added is that, in many circumstances, the president’s decision whether or not to go to war in the first place as well as her decision about what sort of war to prosecute are made in light of the military she has. And, of course, what kind of military she has is a function of the sort of military that Congress chooses to fund. For instance, a Congress that wants to curtail the military’s nuclear capacities can refuse to fund them, as Congress did in 2004 when it eliminated funding for a nuclear bunker-busting bomb, known as the Robust Nuclear Earth Penetrator.²⁷⁹ Likewise, a Congress that wanted to limit presidents’ ability to project American power overseas could choose to reduce or eliminate funding for things like aircraft carriers and long-range bombers.²⁸⁰ Future presidents’ decisions about whether or not to initiate a conflict, and how to do so, would be made in the shadow of those past appropriations decisions.

Once a conflict has been initiated, we frequently hear claims that the presidential decision to send troops into the field essentially forces Congress to fund the operation. But despite this conventional wisdom, Congress has, in fact, repeatedly used its power of the purse to end, limit, or forestall military action. As public opinion began to turn against the Vietnam War, Congress enacted two such restrictions. First, the 1971 Cooper-Church Amendment provided that no funds could be used “to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia.”²⁸¹ And the 1973 Case-Church Amendment—which passed with veto-proof, bipartisan majorities in both houses—effectively cut off all funding for the war: “Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by

United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.²⁸² Nixon, despite resisting the amendments, complied with them.²⁸³ Likewise, the Byrd Amendment in 1993 forbade the use of any funds for security operations in Somalia after March 31, 1994, and required that the troops currently engaged there be under the command of American officers.²⁸⁴ President Clinton complied with the requirement, withdrawing U.S. troops in early March 1994. In the Obama administration, Congress repeatedly frustrated the president's goal of closing the detention camp at Guantanamo Bay Naval Base by forbidding the expenditure of any funds to transfer or release into the United States any prisoner held at the camp who is not a U.S. citizen.²⁸⁵ Similarly, Congress has since 1986 routinely included an appropriations rider forbidding the payment of direct assistance to any foreign government whose elected head of state has been deposed in a military coup.²⁸⁶ A recent study suggests that post-Cold War administrations have generally, albeit imperfectly and grudgingly, complied with this restriction.²⁸⁷ And the existence of the restriction has posed problems when administrations do not want to comply: after the Egyptian coup in 2013, the Obama administration attempted to avoid the restriction by not making any formal declaration that a coup had occurred. The result was "extensive, and critical, media coverage," which eventually pressured the administration into partial, but meaningful, compliance.²⁸⁸

Of course, sometimes such funding restrictions are outright ignored. Despite the sweeping language of the Boland Amendments prohibiting the use of funds to support the Nicaraguan Contras,²⁸⁹ the Reagan administration did indeed arrange to provide funds to the Contras. But the political fallout was severe, with the Iran-Contra scandal dominating the last two years of the Reagan administration in ways that had collateral consequences for other aspects of Reagan's agenda, such as the Bork nomination, discussed in chapter 1. Indeed, as Mariah Zeisberg has persuasively argued, a more deft handling of the scandal and resulting hearings by congressional Democrats might well have resulted in impeachment proceedings.²⁹⁰ The Boland Amendments' specific prohibition on funding the Contras raised the political stakes, and the Reagan administration's flouting of that prohibition forced it to pay a significant price.

In other respects, however, Congress has used its power of the purse in ways that foster the expansion of executive military power. As Fisher has demonstrated, secret funding for the intelligence community has grown explosively since World War II, in some tension with the Constitution's requirement that a

“Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”²⁹¹ Under the Central Intelligence Act, the CIA, with the approval of OMB, is authorized to take money from other government agencies for its own purposes.²⁹² The result is doubly misleading: Congress (and the public) can only guess at the scope of the intelligence budget, and the budgets of other agencies appear inflated because some of the money appropriated to them is subsequently funneled to the intelligence agencies.²⁹³ In the aftermath of revelations that U.S. intelligence agencies have been carrying out a massive domestic surveillance program,²⁹⁴ Congress may wish to reconsider the budgetary latitude that those agencies have been given. As we have seen, pulling the purse strings tighter has been an effective means of reining in executive power throughout Anglo-American constitutional history.

The aim of this chapter has been to survey the extent of the authority available to Congress under the rubric of “the power of the purse.” By tracing the historical development of this power, we’ve been able to see the ideas and goals that have motivated it and to get a sense of what makes its use in a given context efficacious or inefficacious. Some developments—like the increasing percentage of the budget devoted to mandatory spending, certain ill-conceived budgetary showdowns, and the growth of the secret intelligence budget—have diminished congressional power. Others—like more opportunely timed budgetary showdowns, the development of budgetary expertise and institutions in Congress, and the pushback against impoundment—have increased congressional power. Crucially, as stressed in part I of this book, sensitivity to political context, to how certain actions will play out in the public sphere, is crucial to understanding and anticipating the effects of any given exercise of the power of the purse. The growth of mandatory spending may curtail congressional power, but that certainly does not mean that an indiscriminate slashing of entitlements will redound to Congress’s benefit. Budget brinksmanship by House Republicans was so successful in 2011 that it won them a wide range of changes in substantive law, but similar brinksmanship in 2013 was such a failure that their best move was to agree to a two-year budget resolution, thus preemptively giving up that source of leverage the following year. And the success (from Congress’s point of view) of the Cooper-Church, Case-Church, and Byrd amendments does not mean that Congress will inevitably come out smelling like roses when it cuts off funds for military conflicts. The relevant factor in all of these cases is

the politics of the day, and how well the houses and members of Congress are able to use these tools to engage in the public sphere. Like all potent tools, the power of the purse can be used well or poorly.

Moreover, the highly potent versions of these powers, although attention grabbing, are the limiting cases. But while government shutdowns, or even the zeroing-out of some particular program or salary, may be rare, the existence of those extremes—and the ability of Congress plausibly to threaten to go to those extremes—means that all other interbranch bargaining takes place in their shadow. The power of the purse, we have seen, can cast a very long shadow.

Chapter 3. The Power of the Purse

1. See U.S. Const. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).
2. See *id.* § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President . . .”).
3. See *id.* (providing that a two-thirds vote in each house can override a presidential veto).
4. On the concept of “vetogates,” see William N. Eskridge Jr., *Vetogates*, *Chevron Preemption*, 83 *Notre Dame L. Rev.* 1441, 1444–48 (2008). I refer to bicameralism and presentment as *absolute* vetogates because, unlike some of the items to which Eskridge points (e.g., substantive congressional committees, the House Rules Committee, and conference committees), they are not simply major legislative chokepoints, but are, in fact, hardwired constitutional requirements that cannot be circumvented.
5. F. W. Maitland, *The Constitutional History of England* 309 (H. A. L. Fisher ed., 1908). Kantorowicz locates the seeds of English modernity in the growing recognition of “the difference between the king as a personal liege lord and the king as the supra-individual administrator of a public sphere—a public sphere which included the fisc that ‘never died’ and was perpetual because no time ran against it.” Kantorowicz puts the genesis of that recognition in the thirteenth century. Ernst H. Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology* 191 (rev. ed. 1997). But it was still quite a bit longer—a bit more than four centuries, in fact—until the publicness of the public fisc became fully dominant over the private revenues of the king-as-liege-lord.
6. William Blackstone, 1 *Commentaries* *271; see also Maitland, *supra* note 5, at 433–34.
7. See generally William Blackstone, 1 *Commentaries* *272–96.
8. *Id.* at *297 (“[E]xtraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies. . .”).
9. See J. R. Maddicott, *The Origins of the English Parliament, 924–1327*, at 119–26 (2010); Maitland, *supra* note 5, at 66–68.
10. See Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* 69 (1999).
11. For an excellent, detailed history of the development of Parliament in its earliest years, see Maddicott, *supra* note 9. For an extremely abbreviated summary, see Josh Chafetz, “In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation”: Late Tudor Parliamentary Relations and Their Early Stuart Discontents, 25 *Yale J.L. & Human.* 181, 183–85 (2013).
12. See Maddicott, *supra* note 9, at 108, 182.
13. See *id.* at 182 (“Behind appropriation lay the view that taxes should be spent on the purposes for which they had been granted. . .”).
14. Simon Payling, *The Later Middle Ages*, in *The House of Commons: Seven Hundred Years of British Tradition* 48, 51 (Robert Smith & John S. Moore eds., 1996).
15. See Maitland, *supra* note 5, at 184 (noting several instances of this in the fourteenth century and that it “continued with increasing elaboration under the Lancastrian kings”); Theodore F. T. Plucknett, *Taswell-Langmead’s English Constitutional History, from the Teutonic Conquest to the Present Time* 160, 169, 186 (11th ed. 1960).
16. 4 *Rot. Parl.* 302 (1425).

17. Maitland, *supra* note 5, at 309. This calls upon the traditional idea of “Tudor despotism”—the cowing of Parliament by the Tudor monarchs. As I have argued elsewhere, the picture is somewhat more complicated than that; while the Crown certainly maintained the upper hand in matters of state throughout the Tudor period, innovations in parliamentary procedure in the late Tudor period paved the way for parliamentary pushback against the Stuart monarchs. *See* Chafetz, *supra* note 11, at 188–95. But issues of taxing and spending were among those great matters of state in which the Tudors can rightly be said to have, in Wallace Notestein’s memorable phrase, held “the whip hand.” Wallace Notestein, *The Winning of the Initiative by the House of Commons* 13 (1926).
18. *See, e.g.*, Chafetz, *supra* note 11, at 195–201 (tracing the Stuart reaction against the innovations in parliamentary procedure made in the late Tudor period and the parliamentary attempts to hold firm to their institutional gains).
19. Conrad Russell, *The Causes of the English Civil War* 161–84 (1990).
20. *Id.* at 166.
21. *See* Conrad Russell, *King James VI & I and His English Parliaments* 16–18 (Richard Cust & Andrew Thrush eds., 2011) (noting England’s precarious financial situation upon James I’s ascension).
22. Russell, *supra* note 19, at 171.
23. *See* Josh Chafetz, *Impeachment and Assassination*, 95 Minn. L. Rev. 347, 369–83 (2010).
24. *See generally* Chafetz, *supra* note 11.
25. Russell, *supra* note 19, at 185.
26. I have traced this vicious cycle in some detail in Chafetz, *supra* note 23, at 369–84; Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev. 1083, 1100–16 (2009).
27. Maitland, *supra* note 5, at 310; *see also* Plucknett, *supra* note 15, at 428 (“The complete authority exercised by the commons, during the late Civil War and Commonwealth, over the whole receipts and expenditure of the national treasury had accustomed the House to regulate the disbursement of the sums which they granted. . .”).
28. *See* Maitland, *supra* note 5, at 310 (“This precedent [of specific appropriations] was followed in some, but not all, . . . cases under Charles II.”).
29. *See* Tenures Abolition Act, 12 Car. 2, c. 24 (1660); *see also* Maitland, *supra* note 5, at 434–35.
30. *See* Subsidy Act, 12 Car. 2, c. 4 (1660) (life grant); Excise Act, 12 Car. 2, c. 23 (1660) (life grant); Tenures Abolition Act, 12 Car. 2, c. 24, § 14 (1660) (perpetual grant); Arrears of Excise Act, 13 Car. 2, stat. 1, c. 13 (1661) (perpetual grant); Taxation Act, 14 Car. 2, c. 10 (1662) (perpetual grant); Wine Licenses Act, 22 & 23 Car. 2, c. 6 (1670) (perpetual grant).
31. *See* Annabel Patterson, *The Long Parliament of Charles II*, at 5 (2008) (noting the “joyful subservience” of Parliament to the new monarch upon the Restoration).
32. Taxation Act, 12 Car. 2, c. 9 (1660); Taxation Act, 12 Car. 2, c. 20 (1660); Taxation Act, 12 Car. 2, c. 27 (1660). On the disbanding of the Republican army generally, *see* Joyce Lee Malcolm, *Charles II and the Reconstruction of Royal Power*, 35 Hist. J. 307, 315–17 (1992).

33. See Taxation Act, 12 Car. 2, c. 21 (1660); Taxation Act, 12 Car. 2, c. 29 (1660); An Act for a Free and Voluntary Present to his Majesty, 13 Car. 2, stat. 1, c. 4 (1661); Taxation Act, 13 Car. 2, stat. 2, c. 3 (1661); Taxation Act, 15 Car. 2, c. 9 (1663); Taxation Act, 16 & 17 Car. 2, c. 1 (1664).
34. Patterson, *supra* note 31, at 89.
35. See *id.* at 73–74.
36. 11 H.L. Jour. 625 (Nov. 24, 1664).
37. Taxation Act, 16 & 17 Car. 2, c. 1 (1664); see also 8 H.C. Jour. 568 (Nov. 25, 1664) (noting the narrow, 172 to 102, vote in favor of granting the funds).
38. Taxation Act, 17 Car. 2, c. 1, § 5 (1665).
39. *Id.* (requiring “That there be provided and kepte in His Majestyes Exchequer (to witt) in the Office of the Auditor of the Receipt one Booke or Register in which Booke or Register all Moneyes that shall be paid into the Exchequer by this Act shall be entered [& registered] apart and distinct from the Moneyes paid or payable to Your Majestie on the before mentioned Act and from all other Moneyes or Branches of Your Majesties Revenue whatsoever[.] And that alsoe there be one other Booke or Registry provided or kepte in the said Office of all Orders and Warrants to be made by the Lord Treasurer and Under Treasurer or by the Comissers of the Treasury for the time being for payment of all and every Summe and summes of money to all persons for moneyes lent Wares or Goods bought or other payments directed by His Majestie relateing to the service of this Warr.”) (first alteration in original indicating interlineation on the parliamentary roll).
40. *Id.* § 7 (providing that any person willing to lend money to the Crown is to have “accesse unto and [the right to] view and peruse all or any of the said Bookes for their Information of the state of those Moneyes”).
41. Taxation Act, 18 & 19 Car. 2, c. 1, § 33 (1666).
42. *Id.* § 34.
43. *Id.* § 31.
44. See Brian Harwood, *Chivalry & Command: 500 Years of Horse Guards* 37–39 (2006); Clifford Walton, *History of the British Standing Army* 1–14 (London, Harrison & Sons 1894).
45. See John Childs, *The Army of Charles II*, at 13–20 (1976).
46. When Clarendon was impeached in 1667, the first proposed article of impeachment charged that he “designed a Standing Army to be raised, and to govern the Kingdom thereby.” 9 H.C. Jour. 16 (Nov. 6, 1667). This article, however, did not pass the House of Commons.
47. 12 H.L. Jour. 114 (July 29, 1667). For an account of the rumors that were swirling at the time to the effect that Charles meant to rule by standing army, see Patterson, *supra* note 31, at 78–80.
48. Taxation Act, 18 & 19 Car. 2, c. 13, § 6 (1667); Taxation Act, 19 & 20 Car. 2, c. 6, §§ 23–25 (1668).
49. Taxation Act, 18 & 19 Car. 2, c. 13, §§ 10–11 (1667).
50. Accounts of Public Moneyes Act, 19 & 20 Car. 2, c. 1 (1667).
51. Patterson, *supra* note 31, at 89.
52. See Taxation Act, 22 Car. 2, c. 3 (1670); Taxation Act, 22 Car. 2, c. 4 (1670); Taxation Act, 25 Car. 2, c. 1 (1672). A counterexample can be found in Taxation Act, 22 & 23 Car.

- 2, c. 3, § 51 (1670) (appropriating the supply for repayment of debts and “other the occasions aforesaid,” which presumably refers to the broad statement of purposes set out in section 1 of the act).
53. Taxation Act, 29 Car. 2, c. 1, §§ 35, 39, 43–47 (1677); Taxation Act, 29 & 30 Car. 2, c. 1, §§ 58, 61–66, 68 (1678); Taxation Act, 30 Car. 2, c. 1, §§ 15, 19, 22–23, 74 (1678); Billleting Act, 31 Car. 2, c. 1, §§ 21–22 (1679). One customs duty statute from this period was only partially appropriated, Taxation Act, 29 Car. 2, c. 2, §§ 4–8 (1677) (setting aside one-fifth of the raised funds as security for loans to the Crown), and another customs duty statute made no appropriation at all, Taxation Act, 30 Car. 2, c. 2 (1678).
54. 9 H.C. Jour. 562 (Dec. 21, 1678).
55. Mark Knights, *Osborne, Thomas, First Duke of Leeds (1632–1712)*, Oxford Dict. Nat’l Biog. (2008), <http://www.oxforddnb.com/view/article/20884>.
56. 13 H.L. Jour. 724 (Dec. 21, 1680).
57. *Id.*
58. D. W. Hayton, *Seymour, Sir Edward, Fourth Baronet (1633–1708)*, Oxford Dict. Nat’l Biog. (2009), <http://www.oxforddnb.com/view/article/25162>.
59. See Plucknett, *supra* note 15, at 438.
60. See Revenue Act, 1 Jac. 2, c. 1 (1685).
61. Taxation Act, 1 Jac. 2, c. 3 (1685).
62. Taxation Act, 1 Jac. 2, c. 4 (1685).
63. Taxation Act, 1 Jac. 2, c. 5 (1685).
64. *Id.* § 1.
65. It is worth noting that this financial comfort was not primarily due to the few extraordinary grants that Parliament had made him; rather, it was primarily due to economic developments that greatly increased the value of the perpetual grants to the Crown that had been made at the Restoration in lieu of the more traditional sources of ordinary revenue. See Steve Pincus, *1688: The First Modern Revolution* 160 (2009).
66. See Maitland, *supra* note 5, at 328 (finding that “James seems to have had above 16,000 men”); Plucknett, *supra* note 15, at 440 (putting the number of regular troops at James’s command at “about 20,000”); see also Pincus, *supra* note 65, at 181–83 (discussing James’s determination to maintain a standing army).
67. See 9 H.C. Jour. 755–56 (Nov. 9, 1685) (reprinting James’s speech to the houses of Parliament announcing his intention to dispense with the Test Act); Plucknett, *supra* note 15, at 440–43.
68. See Pincus, *supra* note 65, at 182 (“Many English people loathed and feared James II’s modern army. Within months the new standing army had become a national grievance.”).
69. 9 H.C. Jour. 757 (Nov. 13, 1685).
70. 9 H.C. Jour. 761 (Nov. 20, 1685).
71. Bill of Rights, 1 W. & M., sess. 2, c. 2, § 1, cl. 4–5 (1689).
72. *Id.* § 2, cl. 4, 6, 13.
73. The hearth tax had been granted to Charles II, his “Heires and Successors.” Taxation Act, 14 Car. 2, c. 10, § 1 (1662). It was repealed by Hearth Money Act, 1 W. & M., c. 10 (1689). The land tax—which was originally a general property tax but was quickly limited to real property to ease enforcement—was inaugurated in Taxation Act, 1 W. &

M., c. 20 (1689); *see also* Taxation Act, 4 W. & M., c. 1 (1692); Taxation Act, 5 W. & M., c. 1 (1693); etc. The land tax took on its final form as a tax on real property only—the form that it was to maintain throughout the eighteenth century—early in the reign of Queen Anne. *See* Land Tax Act, 2 & 3 Ann., c. 1 (1703); Land Tax Act, 3 & 4 Ann., c. 1 (1704); etc.

Historians have written incisively about the political economy arguments attending the shift from a hearth tax to a land tax. *See, e.g.,* Pincus, *supra* note 65, at 384–85; Colin Brooks, *Public Finance and Political Stability: The Administration of the Land Tax, 1688–1720*, 17 *Hist. J.* 281 (1974). For our purposes here, however, it is the *duration* of the tax that is more interesting than its form—after all, the perpetual hearth tax could have been replaced with a perpetual land tax. (Indeed, this is precisely what Pitt’s government did at the end of the eighteenth century. Perpetual Land Tax Act, 38 Geo. 3, c. 60 (1798).) Parliament’s choice to make it a one-year grant from the Glorious Revolution through the end of the eighteenth century is clearly, in itself, meant to be a form of parliamentary control over the government.

74. Taxation Act, 2 W. & M., c. 4, § 1 (1690). As Gill notes, these were “the mainsprings of government finance.” Doris M. Gill, *The Treasury, 1660–1714*, 46 *Eng. Hist. Rev.* 600, 610 (1931).
75. *See, e.g.,* Taxation Act, 2 W. & M., c. 3 (1690).
76. William Blackstone, 1 *Commentaries* *296.
77. G. M. Trevelyan, *The English Revolution, 1688–1689*, at 96 (1965).
78. *See* Maitland, *supra* note 5, at 310, 433; Plucknett, *supra* note 15, at 428; *see also* Gerhard Casper, *Appropriations of Power*, 13 *U. Ark. Little Rock L. Rev.* 1, 4 (1990).
79. *See* Gill, *supra* note 74, at 610–22.
80. *See id.* at 614–20.
81. Clayton Roberts, *The Growth of Responsible Government in Stuart England* 261 (1966).
82. 1 W. & M., c. 5, §§ 2, 8 (1689).
83. *See, e.g.,* Mutiny Act, 2 W. & M., sess. 2, c. 6 (1690); Mutiny Act, 4 W. & M., c. 13 (1692); *see also* Frederick Bernays Wiener, *Civilians under Military Justice: The British Practice Since 1689 Especially in North America* 8 & n.9 (1967) (noting that, “[e]xcept only during the years 1698–1702, an annual Mutiny Act was always in force” between 1688 and 1879).
84. *See* Roberts, *supra* note 81, at 245–378; Basil Williams, *The Whig Supremacy, 1714–1760*, at 30–40 (rev. C. H. Stuart, 2d ed. 1960).
85. Maitland, *supra* note 5, at 385.
86. *Id.* at 446.
87. *Id.* at 446 n.1; *see also* A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 203 (Liberty Fund 1982) (8th ed. 1915) (“[N]ot a penny of revenue can be legally expended except under the authority of some Act of Parliament.”).
88. Maitland, *supra* note 5, at 310 (“Before the end of William’s reign, a certain annual sum is assigned to the king for his own use; we begin to have what is afterwards called a civil list; the residue of the money is voted for this purpose and for that—so much for the navy, so much for the army.”); *see also id.* at 435 (referring to this process as “the gradual separation of . . . the king’s private pocket-money from the national revenue”); William Blackstone, 1 *Commentaries* *321–22 (describing the civil list).

89. See Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689–1776*, at 51 (1963).
90. *Id.* at 87–107.
91. *Id.* at 87.
92. *Id.* at 107.
93. *Id.*
94. See *id.* at 88, 90, 96, 98, 102.
95. Jack P. Greene, *Bridge to Revolution: The Wilkes Fund Controversy in South Carolina, 1769–1775*, 29 J. Southern Hist. 19, 20–21 (1963).
96. *Id.* at 20.
97. On Wilkes's fights with both houses of Parliament, see Josh Chafetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions* 155–58 (2007); for a discussion of American colonial lionization of Wilkes, see Pauline Maier, *John Wilkes and American Disillusionment with Britain*, 20 Wm. & Mary Q. 373 (1963); for a discussion of Wilkes as a libertarian hero, see Chafetz, *supra* note 23, at 389–90 & n.334; for a full account of Wilkes's life, see Arthur H. Cash, *John Wilkes: The Scandalous Father of Civil Liberty* (2006).
98. Greene, *supra* note 95, at 26.
99. *Id.* at 26–28.
100. *Id.* at 28–29.
101. *Id.* at 26–50.
102. *Id.* at 52.
103. Warren M. Billings, *A Little Parliament: The Virginia General Assembly in the Seventeenth Century* 183 (2004).
104. *Id.* at 187–88.
105. 3 Herbert L. Osgood, *The American Colonies in the Eighteenth Century* 156–57 (1958).
106. See Evarts Boutell Greene, *The Provincial Governor in the English Colonies of North America* 191–92 (1966).
107. 4 Osgood, *supra* note 105, at 123.
108. More precisely, it charged the salary to the quit-rent fund. *Id.* at 124. On the survival of this feudal charge on land in the American colonies, see Beverley W. Bond Jr., *The Quit-Rent System in the American Colonies*, 17 Am. Hist. Rev. 496 (1912).
109. See Greene, *supra* note 89, at 129–47.
110. Declaration of Independence, para. 11 (1776).
111. Greene, *supra* note 89, at 138.
112. See Greene, *supra* note 106, at 173–75 (giving further examples).
113. Articles of Confederation, art. 9, § 5.
114. *Id.* art. 8; see also E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776–1790*, at 220–50 (1961); Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 275–96, 337–42 (1979).
115. Articles of Confederation, art. 9, §§ 5–6.
116. 4 *Journals of the Continental Congress* 223 (Mar. 21, 1776) (appropriating \$12,000 for that purpose).
117. 7 *id.* at 294 (Apr. 23, 1777) (appropriating “115 30/90 dollars” for that purpose).

118. 27 *id.* at 704 (Dec. 23, 1784) (appropriating up to \$100,000 for that purpose).
119. Del. Const. of 1776, art. 7 (The president “may draw for such sums of money as shall be appropriated by the general assembly, and be accountable to them for the same. . . .”); Mass. Const. of 1780, pt. 2, ch. 2, § 1, art. 11 (“No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer’s notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.”); N.H. Const. of 1784, pt. 2, Executive, para. 14 (“No monies shall be issued out of the treasury of this state, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurers’ notes, or for the payment of interest arising thereon) but by warrant under the hand of the president for the time being, by and with the advice and consent of the council, for the necessary support and defence of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.”); N.C. Const. of 1776, art. 19 (“[T]he Governor, for the time being, shall have power to draw for and apply such sums of money as shall be voted by the general assembly, for the contingencies of government, and be accountable to them for the same.”); Penn. Const. of 1776, Frame of Gov’t, § 20 (The president and council “may draw upon the treasury for such sums as shall be appropriated by the house [of representatives]. . . .”); S.C. Const. of 1778, art. 16 (providing “that no money be drawn out of the public treasury but by the legislative authority of the State”); Vt. Const. of 1786, ch. 2, § 11 (The governor and council “may draw upon the Treasurer for such sums as may be appropriated by the House of Representatives.”). An earlier Vermont republican constitution contained a similar provision. *See* Vt. Const. of 1777, ch. 2, § 18.
120. Md. Const. of 1776, art. 13; Mass. Const. of 1780, pt. 2, ch. 2, § 4, art. 1; N.H. Const. of 1784, pt. 2, Secretary, Treasurer, Commissary-General, &c., para. 1; N.J. Const. of 1776, art. 12; N.Y. Const. of 1777, art. 22; N.C. Const. of 1776, art. 22; Penn. Const. of 1776, Frame of Gov’t, § 9; S.C. Const. of 1778, art. 29; Va. Const. of 1776, para. 17. Vermont had an elected treasurer, but if no candidate received a majority, then the legislature appointed one. Vt. Const. of 1786, ch. 2, § 10.
121. Ga. Const. of 1777, art. 49.
122. Ga. Const. of 1798, art. 1, § 24. *See also* Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 *Mil. L. Rev.* 1, 62–64 (1998) (noting the pattern that, when governors became stronger, state constitutions became more explicit about legislative control over appropriations).
123. Casper, *supra* note 78, at 8; *see also* Rosen, *supra* note 122, at 57 (“Late eighteenth century Americans unquestionably understood that the powers to tax and spend were legislative, not executive, powers.”).
124. Mass. Const. of 1780, pt. 2, ch. 2, § 1, art. 13; S.C. Const. of 1778, art. 37.
125. N.H. Const. of 1784, pt. 2, Executive, para. 17.
126. *Id.* para. 16.
127. Bill of Rights, 1 W. & M., sess. 2, c. 2, § 2, cl. 13 (1689).
128. *See* U.S. Const. art. I, § 4, cl. 2; *id.* amend. XX, § 2.

129. See Rosen, *supra* note 122, at 69–73.
130. U.S. Const. art. I, § 9, cl. 7.
131. *Id.* art. II, § 1, cl. 7 (presidential salaries); *id.* art. III, § 1 (judicial salaries); *id.* amend. XXVII (congressional salaries).
132. See Declaration of Independence, para. 13 (1776) (complaining that the king “has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures”); Md. Const. of 1776, Dec. of Rts., art. 26 (“[S]tanding armies are dangerous to liberty, and ought not to be raised or kept up, without consent of the Legislature.”); Va. Const. of 1776, Bill of Rts., § 13 (“[S]tanding armies, in time of peace, should be avoided, as dangerous to liberty; and . . . in all cases the military should be under strict subordination to, and governed by, the civil power.”).
133. U.S. Const. art. I, § 8, cl. 12.
134. Hamilton, writing as Publius, made this point explicit when he noted that building an army “so large as seriously to menace” the liberties of the people would take a great deal of time. Given the requirement of biennial congressional elections and the prohibition on military appropriations lasting for more than two years, he thought it improbable that an oppressive standing army could be constructed. *The Federalist No. 26*, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
135. U.S. Const. art. I, § 8, cl. 13.
136. *Id.* amend. III.
137. William Blackstone, 1 *Commentaries* *405.
138. *The Federalist No. 41* (James Madison), *supra* note 134, at 260–61.
139. 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 58–59 (Jonathan Elliot ed., 2d ed. 1907).
140. *Id.* at 393.
141. 2 *id.* at 349.
142. See generally Rosen, *supra* note 122, at 78–83.
143. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 239–42 (1989); see also House Comm. on House Admin., *History of the United States House of Representatives, 1789–1994*, H.R. Doc. No. 103-324, at 23–24 (1994).
144. An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 4, 1 Stat. 28 (1789); An Act to Establish an Executive Department, to be Denominated the Department of War, ch. 7, 1 Stat. 49 (1789).
145. An Act to Establish the Treasury Department, ch. 12, § 1, 1 Stat. 65, 65 (1789).
146. *Id.* §§ 2, 4, 1 Stat. at 65–66.
147. Casper, *supra* note 143, at 241; see also Ralph Volney Harlow, *The History of Legislative Methods in the Period before 1825*, at 132–33 (1917) (“It seems evident that [in creating the Treasury] Congress planned to create an agent, not for the executive, but for itself.”).
148. Appropriations Act, ch. 23, 1 Stat. 95, 95 (1789).
149. See, e.g., Invalid Pensioners Act, ch. 24, 1 Stat. 95, 95 (1789); Appropriations Act, ch. 4, 1 Stat. 104, 104 (1790); Appropriations Act, ch. 6, 1 Stat. 190, 190 (1791); Appropriations Act, ch. 3, 1 Stat. 226, 226 (1791).
150. See Casper, *supra* note 78, at 10.
151. Appropriations Act, ch. 23, 1 Stat. 95, 95 (1789).

152. Appropriations Act, ch. 4, § 1, 1 Stat. 104, 104 (1790).
153. *Id.* § 3, 1 Stat. at 105.
154. See Casper, *supra* note 78, at 12–14 (tracing this process).
155. See David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 165–67 (1997); Casper, *supra* note 78, at 14–15.
156. Albert Gallatin, *A Sketch of the Finances of the United States* (1796), in 3 *The Writings of Albert Gallatin* 69, 111 (Henry Adams ed., Philadelphia, J. B. Lippincott & Co. 1879). As David Currie explains it, for Hamilton to have followed Giles’s understanding of the law “would apparently have required him to transport one sum of money home from Europe and another back to take its place.” Currie, *supra* note 155, at 166.
157. See Raymond Walters Jr., *Albert Gallatin: Jeffersonian Financier and Diplomat* 88–89 (1957); Norman K. Risjord, *Partisanship and Power: House Committees and the Powers of the Speaker, 1789–1801*, 49 Wm. & Mary Q. 628, 640–43 (1992).
158. See Casper, *supra* note 78, at 16–17.
159. An Act Further to Amend the Several Acts for the Establishment and Regulation of the Treasury, War, and Navy Departments, ch. 28, § 1, 2 Stat. 535, 535–36 (1809). See also Noble E. Cunningham Jr., *The Process of Government under Jefferson* 114–17 (1978) (describing Gallatin’s role in the passage of this legislation and its place in his larger financial thinking).
160. See generally Rosen, *supra* note 122, at 103–10.
161. For extensive analyses of these statutes and their modern forms, see Kate Stith, *Congress’ Power of the Purse*, 97 Yale L.J. 1343, 1363–77 (1988).
162. Miscellaneous Receipts Statute, ch. 110, § 1, 9 Stat. 398, 398–99 (1849).
163. See Stith, *supra* note 161, at 1371–72.
164. Appropriations Act, ch. 251, § 7, 16 Stat. 230, 251 (1870).
165. Anti-Deficiency Act, ch. 1484, § 4, 33 Stat. 1214, 1257–58 (1905) (emphasis added).
166. Rebecca Kysar has attacked sunset provisions on a number of fronts. See Rebecca M. Kysar, *Lasting Legislation*, 159 U. Pa. L. Rev. 1007, 1051–65 (2011). The merits of Kysar’s particular attacks are beyond the scope of this chapter, but it should be noted that none of her arguments addresses the separation-of-powers implications of sunset provisions, which are my focus here.
167. See U.S. Const. art. I, § 7, cl. 2.
168. See USA PATRIOT Act, Pub. L. No. 107-56, § 224(a), 115 Stat. 272, 295 (2001) (“[T]his title and the amendments made by this title . . . shall cease to have effect on December 31, 2005.”). As Republican Representative Dan Lungren put it, “An integral aspect of the logic of sunsets was that they would entail a vigorous exercise of the oversight function of Congress. . . . The pendency of an expiration date provides additional incentives for the exercise of oversight and scrutiny.” Daniel E. Lungren, *A Congressional Perspective on the Patriot Act Extenders*, 26 Notre Dame J.L. Ethics & Pub. Pol’y 427, 432 (2012).
169. See Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 Geo. Wash. L. Rev. 1145, 1172, 1178–79 (2004) (noting that the Bush administration preferred a bill lacking a sunset clause).
170. Staff of S. Comm. on the Budget, 105th Cong., *The Congressional Budget Process: An Explanation* 5 (Comm. Print 1998); see also Allen Schick, *The Federal Budget: Politics*,

Policy, Process 57 (3d ed. 2007) (“Direct spending is not controlled by annual appropriations but by the legislation that establishes eligibility criteria and payment formulas, or otherwise obligates the government.”).

171. Staff of S. Comm. on the Budget, *supra* note 170, at 5.
172. *See id.* at 5–6, 56.
173. *See id.* at 6 (“Most of the actual operations of the Federal Government are funded by discretionary spending.”).
174. *See* Office of Mgmt. & Budget, *Budget of the U.S. Government, Fiscal Year 2017*, at 120 tbl.S-4 (2016) (recording that, for fiscal year 2016, total spending was projected to be \$3.952 trillion, of which \$2.727 trillion would go to mandatory spending and net interest).
175. *See* Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 Harv. J. on Legis. 297, 314 (1998) (noting the considerable growth in mandatory spending since the 1960s).
176. *See* Alan L. Feld, *The Shrunk Power of the Purse*, 89 B.U. L. Rev. 487, 492 (2009) (noting that the prevalence of “permanent fiscal legislation limits Congress’s ability to review and change priorities through the appropriation process”).
177. *See* Louis Fisher, *Constitutional Conflicts between Congress and the President* 195 (5th ed. 2007).
178. Allen Schick, *Whose Budget? It All Depends on Whether the President or Congress Is Doing the Counting*, in *The Presidency and the Congress: A Shifting Balance of Power* 96, 97 (William S. Livingston et al. eds., 1979).
179. Schick, *supra* note 170, at 10–14.
180. Pub. L. No. 67-13, 42 Stat. 20.
181. 31 U.S.C. § 1105(a) (2006) (“On or after the first Monday in January but not later than the first Monday in February of each year, the President shall submit a budget of the United States Government for the following fiscal year.”).
182. *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 Stan. L. Rev. 573, 589 (2008) (noting the “first-mover advantage [that] . . . accrues from the President’s ability to propose an initial budget”); *see also* Fisher, *supra* note 177, at 195, 199 (noting the executive-empowering features of the 1921 act); Schick, *supra* note 170, at 14 (suggesting that the 1921 act ushered in an era of “presidential dominance” of the budget process).
183. Budget and Accounting Act of 1921 §§ 207–17, 42 Stat. at 22–23.
184. Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 St. Louis U. L.J. 931, 945–46 (1999).
185. Fisher, *supra* note 177, at 196.
186. *See generally* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2272–2319 (2001); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 Yale L.J. 2182 (2016).
187. Budget and Accounting Act of 1921 §§ 301–17, 42 Stat. at 23–27.
188. *See* Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* 89–94 (2001).
189. *See* Schick, *supra* note 170, at 14–18.
190. *See* Schick, *supra* note 178, at 99–100.

191. Pub. L. No. 93-344, 88 Stat. 297.
192. On the 1974 act, see Fisher, *supra* note 177, at 202–04; Schick, *supra* note 170, at 18–20; Schick, *supra* note 178, at 104–08; Schickler, *supra* note 188, at 195–200; Staff of S. Comm. on the Budget, *supra* note 170, at 8–9.
193. On the subsequent statutes, see Fisher, *supra* note 177, at 204–06.
194. Thomas Jefferson, Third Annual Message to Congress (Oct. 17, 1803), in 1 *A Compilation of the Messages and Papers of the Presidents* 345, 348 (James D. Richardson ed., New York, Bureau of Nat'l Lit. 1897). For just a few examples referring to this as the first instance of impoundment, see, e.g., Arthur M. Schlesinger Jr., *The Imperial Presidency* 235 (1973); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 841 n.384 (2013); Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135, 159 (1972).
195. An Act to Provide Additional Armament, ch. 11, § 3, 2 Stat. 206, 206 (1803).
196. 21 Op. Att'y Gen. 414, 415 (1896).
197. See Wm. Bradford Middlekauff, Note, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 Yale L.J. 209, 211 (1990) (“It makes little sense for Congress to challenge the executive when money is impounded because the original purpose of the appropriation no longer exists or because efficiencies can be achieved.”); see also Fisher, *supra* note 194, at 160 (noting that, when the president engages in such routine impoundments, “few legislators are likely to challenge him”).
198. See Schlesinger, *supra* note 194, at 236; Fisher, *supra* note 177, at 199–200.
199. See Schlesinger, *supra* note 194, at 237–38 (Nixon “embarked on an impoundment trip unprecedented in American history.”); Fisher, *supra* note 177, at 200 (“On an entirely different order were the impoundments carried out by the Nixon administration. They set a precedent in terms of magnitude, severity, and belligerence.”); Schick, *supra* note 178, at 103 (“Far from administrative routine, Nixon’s wholesale impoundments in late 1972 and 1973 were intended to rewrite national priorities at the expense of congressional power and preferences.”); Middlekauff, *supra* note 197, at 212 (“The Nixon Administration changed the unwritten rules of the impoundment battle.”).
200. Schick, *supra* note 178, at 103.
201. Middlekauff, *supra* note 197, at 212.
202. 420 U.S. 35 (1975).
203. See Fisher, *supra* note 177, at 200 (discussing these cases).
204. Pub. L. No. 93-344, §§ 1001–17, 88 Stat. 297, 332–39 (1974), *codified at* 2 U.S.C. §§ 681–88 (2006).
205. 2 U.S.C. § 683 (2006).
206. Impoundment Control Act § 1013, 88 Stat. at 334–35.
207. 462 U.S. 919 (1983).
208. *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).
209. Pub. L. No. 100-119, § 206, 101 Stat. 754, 785–86 (1987), *as codified at* 2 U.S.C. § 684 (2006).
210. Middlekauff, *supra* note 197, at 218–19.

211. *Id.* at 219.
212. *Id.*
213. Schick, *supra* note 178, at 109–10.
214. Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996).
215. *Clinton v. City of New York*, 524 U.S. 417 (1998).
216. Schick, *supra* note 170, at 19; *see also* Fisher, *supra* note 177, at 202.
217. *The Federalist No. 58* (James Madison), *supra* note 134, at 359.
218. Charles L. Black Jr., *The Working Balance of the American Political Departments*, 1 Hastings Const. L.Q. 13, 15 (1974).
219. Mike Dorf, who suggested the air conditioning hypothetical in conversation, is also the source of the hypothetical about cutting the salaries of judicial staff. *See* Michael C. Dorf, *Fallback Law*, 107 Colum. L. Rev. 303, 331 (2007). Dorf raises the possibility that such cuts would be an unconstitutional violation of a free-floating structural principle of judicial independence, but he does not take a position on the question. *See id.* at 331–32. *See also* Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 Colum. L. Rev. 501, 531 (2002) (“Congress may curtail the judiciary’s physical facilities and fringe benefits as it pleases; nothing in the Constitution would bar Congress from turning the Supreme Court building into a museum and sending the Justices to hear cases in, say, the basement of the Smithsonian.”).
220. *See* U.S. Const. art. II, § 1, cl. 7 (“The President shall . . . receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected. . .”).
221. *See id.* art. III, § 1 (“The Judges, both of the supreme and inferior Courts . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).
222. J. Gregory Sidak, *The President’s Power of the Purse*, 1989 Duke L.J. 1162, 1162; *see also id.* at 1208–14 (giving specific examples from the appropriations legislation for fiscal year 1990).
223. Act of May 1, 1810, ch. 44, § 2, 2 Stat. 608, 608.
224. *See, e.g.*, 4 Asher C. Hinds, *Hinds’ Precedents of the House of Representatives of the United States* §§ 3681–86, 3699, 3917–26, 3942–46, 3948–54, at 449–53, 461–62, 617–21, 636–47 (1907) (giving examples from the late nineteenth and early twentieth-century House).
225. *See, e.g.*, L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J. Legis. 221, 224–28 (2000) (giving several examples).
226. Consular and Diplomatic Appropriations Act, ch. 125, § 7, 15 Stat. 319, 322 (1869).
227. *See, e.g.*, Sidak, *supra* note 222, at 1202–43; Sutin, *supra* note 225, at 232–39, 255–58.
228. 328 U.S. 303 (1946).
229. *Id.* at 313–14.
230. Sai Prakash reads *Lovett* similarly. *See* Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779, 1800–1801 (2006).
231. The current version of the Anti-Deficiency Act provides that “[a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the

- protection of property.” 31 U.S.C. § 1342. “Essential” government personnel—that is, those deemed necessary to protect life or property—continue to report for work, even during government “shutdowns,” although they cannot be paid until the government reopens. The executive branch has interpreted “essential” government personnel expansively, but it is nevertheless the case that “shutdowns” have a pervasive impact on government operations. *See* Auth. to Employ the Servs. of White House Office Emps. During an Appropriations Lapse, 19 Op. O.L.C. 235, 235 (1995); Auth. for the Continuance of Gov’t Functions During a Temp. Lapse in Appropriations, 5 Op. O.L.C. 1, 11–12 (1981).
232. *See* Ari Hoogenboom, *Rutherford B. Hayes: Warrior and President* 392–94 (1995).
233. *See id.* at 396–402.
234. *See id.* at 399, 402.
235. *Id.* at 402.
236. For the first seventeen, see Sharon S. Gressle, *Shutdown of the Federal Government: Causes, Effects, and Process*, CRS Report for Cong. No. 98-844, at 6 (2001). For the eighteenth, see Jonathan Weisman & Ashley Parker, *Shutdown Is Over*, N.Y. Times, Oct. 17, 2013, at A1.
237. *See generally* Elizabeth Drew, *Showdown: The Struggle between the Gingrich Congress and the Clinton White House* 330–41, 355–67 (1996) (describing the shutdowns); Gressle, *supra* note 236, at 2–3 (same).
238. *See* Richard S. Conley, *President Clinton and the Republican Congress, 1995–2000: Political and Policy Dimensions of Veto Politics in Divided Government*, 31 Cong. & Presidency 133, 151 (2004) (“By early January 1996 it became clear that the public was beginning to ascribe far greater blame to the Congress than to the president for the policy confrontation and stalemate.”).
239. *See, e.g.*, Chris McGreal, *Midterms 2010: Lessons of 1994*, Guardian (London), Nov. 4, 2010, at 13 (suggesting, based on the evidence of the 1995 shutdown alone and without regard to context, that the president enjoys a significant advantage in a budget shutdown); Steve Benen, *Norquist Thinks the GOP Will Win from Another Shutdown*, Wash. Monthly Pol. Animal Blog (Nov. 19, 2010), http://www.washingtonmonthly.com/archives/individual/2010_11/026718.php (noting that some Republicans “seriously believe that the public would credit Republicans for shutting down the government” and asking “whether Republican leaders are crazy enough to think this is a good idea”).
240. Jennifer Steinhauer, *Last Shutdown Is a Lesson Lost on Capitol Hill as a New Crisis Looms*, N.Y. Times, Sept. 29, 2013, at A18.
241. Steven M. Gillon, *The Pact: Bill Clinton, Newt Gingrich, and the Rivalry That Defined a Generation* 159 (2008).
242. *See* Ann Devroy & Eric Pianin, *Talks on 7-Year Balanced Budget ‘Goal’ Collapse*, Wash. Post, Nov. 18, 1995, at A1 (discussing the president’s slipping public approval ratings and the mounting pressure from House Democrats who “urg[ed] passage of a new continuing resolution and instruct[ed] the President to work with Congress to develop a seven-year balanced budget ‘without preconditions’”); Todd S. Purdum, *President and G.O.P. Agree to End Federal Shutdown and to Negotiate a Budget*, N.Y. Times, Nov. 20, 1995, at A1 (stating that, “[w]hile early public opinion polls” favored the president, “[t]he consensus on Capitol Hill was that Mr. Clinton would have had a

hard time sustaining a veto if Democrats were given another chance to vote on” “a stopgap spending measure . . . that . . . included the goal of balancing the budget in seven years”). It is also worth noting that Clinton’s approval ratings did suffer in the shutdowns’ aftermath, although not as much as Congress’s did. See Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining before an Audience*, 45 Am. J. Pol. Sci. 100, 112 n.29 (2001).

243. During the shutdown, Gingrich publicly complained about the seating arrangements for a flight on Air Force One. Gillon, *supra* note 241, at 160. As Gillon notes, “Gingrich’s childish verbal tirade was a public relations disaster for the Republicans. Coming in the second day of the shutdown when public opinion was still malleable, it made the Republicans seem petulant and stubborn. . . .” *Id.*
244. See *id.* at 170 (“Gingrich could have declared victory at a number of points [during budget negotiations]. . . . [But] Gingrich misinterpreted the results of the 1994 election and oversold the revolution.”); Conley, *supra* note 238, at 151 (“[T]he Republican leadership had overestimated support for the Contract [with America] following the 1994 elections. . . .”).
245. Peter Baker & Carl Hulse, *The Great Divide: Obama and G.O.P.*, N.Y. Times, Nov. 4, 2010, at A1.
246. See Peter Baker, *Washington Worries about Its New Power Couple*, N.Y. Times, Nov. 10, 2010, at A24.
247. See Further Additional Continuing Appropriations Amendments, 2011, Pub. L. No. 112-8, 125 Stat. 34; Additional Continuing Appropriations Amendments, 2011, Pub. L. No. 112-6, 125 Stat. 23; Further Continuing Appropriations Amendments, 2011, Pub. L. No. 112-4, 125 Stat. 6; Continuing Appropriations and Surface Transportation Extension Act, 2011, Pub. L. No. 111-322, 124 Stat. 3518 (2010); Act of Dec. 18, 2010, Pub. L. No. 111-317, 124 Stat. 3454; Act of Dec. 4, 2010, Pub. L. No. 111-290, 124 Stat. 3063; Continuing Appropriations Act, 2011, Pub. L. No. 111-242, 124 Stat. 2607 (2010).
248. The final budget deal is embodied in Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38.
249. See Jennifer Steinhauer, *2011 Budget Bill with Cuts Is Approved by Congress*, N.Y. Times, Apr. 15, 2011, at A1 (spending cuts); Felicity Barringer & John M. Broder, *Congress, in a First, Removes an Animal from the Endangered Species List*, N.Y. Times, Apr. 13, 2011, at A16 (“A rider to the Congressional budget measure . . . dictates that wolves in Montana and Idaho be taken off the endangered species list. . . . The rider is the first known instance of Congress’ directly intervening in the list.”); Trip Gabriel, *Budget Deal Fuels Revival of School Vouchers*, N.Y. Times, Apr. 15, 2011, at A18 (noting that the budget deal included a provision financing school vouchers in Washington, D.C.); Editorial, *The Crisis Next Time*, N.Y. Times, Apr. 11, 2011, at A24 (noting that a provision in the budget deal prohibited the District of Columbia from spending any public money on abortion provision).
250. See James Risen, *Obama Takes on Congress over Policy Czar Positions*, N.Y. Times, Apr. 17, 2011, at A17. In a signing statement, President Obama suggested that this provision of the budget law may be an unconstitutional infringement of his inherent Article II powers. See *Statement on Signing the Department of Defense and Full-Year*

- Continuing Appropriations Act, 2011*, 2011 Daily Comp. Pres. Doc. 263 (Apr. 15, 2011). On the separation-of-powers tussle over “policy czars,” see generally Kevin Sholette, Note, *The American Czars*, 20 Cornell J.L. & Pub. Pol’y 219 (2010).
251. See Jackie Calmes & Peter Baker, *Back to Work: Obama Greeted by Looming Fiscal Crisis*, N.Y. Times, Nov. 8, 2012, at A1.
252. See *id.* (noting that “[i]f Mr. Obama got a mandate for anything,” it was for raising taxes on the wealthy).
253. See Josh Chafetz, *The Phenomenology of Gridlock*, 88 Notre Dame L. Rev. 2065, 2068–72 (2013).
254. See Quinnipiac Univ. Polling Inst., *American Voters Reject GOP Shutdown Strategy 3–1*, Oct. 1, 2013, <http://www.quinnipiac.edu/institutes-and-centers/polling-institute/national/release-detail?ReleaseID=1958>.
255. See, e.g., *Republicans Lose Ground vs. Obama in the Shutdown Blame Game*, ABC News/Wash. Post Poll, Oct. 7, 2013, <http://www.langerresearch.com/uploads/1144a29TheShutdown.pdf>; Andrew Dugan, *Republican Party Favorability Sinks to Record Low*, Gallup, Oct. 9, 2013, <http://www.gallup.com/poll/165317/republican-party-favorability-sinks-record-low.aspx>; Scott Clement & Peyton M. Graighill, *Poll: Republicans Losing No-Win Game*, Wash. Post The Fix, Oct. 14, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/10/14/poll-republicans-losing-no-win-game/>.
256. See Assoc. Press, *Wall St. Climbs as Hopes for Détente on Debt Emerge*, N.Y. Times, Oct. 10, 2013, at B8.
257. On conservative interest groups, see, e.g., Eric Lipton & Nicholas Confessore, *Kochs and Other Conservatives Split over Strategy on Health Law*, N.Y. Times, Oct. 11, 2013, at A14; Jonathan Weisman, *As Pressure Mounts, House G.O.P. Weighs Short-Term Debt Deal*, N.Y. Times, Oct. 10, 2013, at A19. On opinion leaders, see, e.g., John Podhoretz, *Suicide of the Right*, N.Y. Post Online, Oct. 8, 2013, <http://nypost.com/2013/10/08/suicide-of-the-right/>; Editorial, *A GOP Shutdown Strategy*, Wall St. J., Oct. 2, 2013, at A12.
258. See Weisman & Parker, *supra* note 236.
259. Bipartisan Budget Act of 2013, Pub. L. No. 113-67, 127 Stat. 1165; Jonathan Weisman, *Budget Vote Passes the Details to Two Panels*, N.Y. Times, Dec. 19, 2013, at A26.
260. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584; David M. Herszenhorn, *Congress Strikes a Budget Deal with President*, N.Y. Times, Oct. 27, 2015, at A1.
261. John C. Roberts, *Are Congressional Committees Constitutional? Radical Textualism, Separation of Powers, and the Enactment Process*, 52 Case W. Res. L. Rev. 489, 564 (2001). A recent survey of congressional drafters confirms that they use legislative history in the appropriations context for the explicit purpose of directing agencies and departments in their spending of the appropriated funds. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 980 (2013); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725, 761, 768 (2014).

262. Roberts, *supra* note 261, at 564.
263. 155 Cong. Rec. H7907 (daily ed. July 9, 2009).
264. For the details of this confrontation, see Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 Am. J. Int'l L. 517, 547–49 (2013).
265. Roberts, *supra* note 261, at 564.
266. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5; Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130. On the IRS budget, see Howard Gleckman, *IRS Gets Hammered in the 2014 Budget Agreement*, TaxVox, Jan. 14, 2014, <http://taxvox.taxpolicycenter.org/2014/01/14/irs-gets-hammered-in-the-2014-budget-agreement/>; Ed O'Keefe, *Congressional Leaders Agree on \$1.01 Trillion Spending Bill*, Wash. Post, Dec. 10, 2014, at A3.
267. For an earlier generation of works in this vein, see, e.g., Joseph P. Harris, *Congressional Control of Administration* (1964); Michael W. Kirst, *Government without Passing Laws: Congress' Nonstatutory Techniques for Appropriations Control* (1969). For more recent works, see, e.g., Daugirdas, *supra* note 264, at 533–42; Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy? Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. Econ. & Org. 119, 122–26 (1996); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. Econ. & Org. 243 (1987); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. Pol. Econ. 765, 780–92 (1983); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1825–27 (2012); Miranda Yaver, *Asserting the Power of the Purse: Institutional Conflict and Regulatory Authority* (draft), <http://ssrn.com/abstract=2125438>.
268. Morris P. Fiorina, *Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in *The Presidency and the Congress*, *supra* note 178, at 124, 125.
269. On the importance of the budget as a signaling device, see Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 Am. Pol. Sci. Rev. 283 (1996); see also Note, *supra* note 267, at 1825–27 (noting that congressional budget control is accomplished through control of overall spending levels, earmarks and riders, and threats and signaling).
270. 462 U.S. 919 (1983).
271. Anthony M. Bottenfield, Comment, *Congressional Creativity: The Post-Chadha Struggle for Agency Control in the Era of Presidential Signing Statements*, 112 Penn. St. L. Rev. 1125, 1138 (2008).
272. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 Law & Contemp. Probs. 273, 288 (Autumn 1993).
273. Jessica Korn, *The Legislative Veto and the Limits of Public Choice Analysis*, 109 Pol. Sci. Q. 873, 883 (1994–1995).
274. Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. Legal Stud. 131, 136–46 (1991); Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*, 16 Int'l Rev. L. & Econ. 433, 439–44 (1996).

275. See generally Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940* (2013).
276. See *id.* at 76–78 (discussing the social and political justifications of negotiation in the late eighteenth century); *id.* at 80–110 (discussing attempts to maintain the fee system while banning negotiation).
277. *Id.* at 273–89.
278. Eric Schmitt, *Troops’ Queries Leave Rumsfeld on the Defensive*, N.Y. Times, Dec. 9, 2004, at A1.
279. See Matthew L. Wald, *Nuclear Weapons Money Is Cut from Spending Bill*, N.Y. Times, Nov. 23, 2004, at A22.
280. David Mayhew has noted that, “[n]otwithstanding an occasional out-front hawkishness, as in 1898 vis-à-vis Spain, Congress, on occasions when it has differed with the presidency on foreign policy, has ordinarily leaned toward quietude and stasis.” In Mayhew’s view, Congress’s relative resistance to imperial adventuring explains the “relative lack of colonies that came to be physically possessed” by the United States. David R. Mayhew, *Congress as a Handler of Challenges: The Historical Record*, 29 Stud. Am. Pol. Dev. 185, 196–97 (2015). Of course, a resistance to permanent territorial acquisition is itself a limitation on future imperial adventuring.
281. Cooper-Church Amendment, Pub. L. No. 91-652, § 7(a), 84 Stat. 1942, 1943 (1971).
282. Case-Church Amendment, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973).
283. On Nixon’s (and Kissinger’s) resistance to these measures, as well as their efficacy in reining in the president, see Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* 163–68 (2013); see also Thomas M. Franck & Edward Weisband, *Foreign Policy by Congress* 13–33 (1979); Amy Belasco et al., *Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches*, CRS Report for Cong. No. RL33803, at 1–3 (2007); Rosen, *supra* note 122, at 93.
284. Byrd Amendment, Pub. L. No. 103-139, § 8151(b)(2)(B), 107 Stat. 1418, 1476–77 (1993).
285. Recent Legislation, *National Defense Authorization Act for Fiscal Year 2013*, Pub. L. No. 112-239, § 1028, 126 Stat. 1632, 1914–17 (codified at 10 U.S.C. § 801 note (2012)), 127 Harv. L. Rev. 835, 835–37 (2013); Charlie Savage, *Decaying Guantánamo Defies Closing Plans*, N.Y. Times, Sept. 1, 2014, at A1.
286. On the history of this provision, see Note, *Congressional Control of Foreign Assistance to Post-Coup States*, 127 Harv. L. Rev. 2499, 2502–03 (2014).
287. *Id.* at 2503–09.
288. *Id.* at 2508–09.
289. The strictest language is contained in the 1984 Boland Amendment, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 1935 (1984) (prohibiting “any . . . agency or entity of the United States involved in intelligence activities” from obligating or spending any funds “for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual”).
290. Zeisberg, *supra* note 283, at 190–93, 196–202, 211–17.

291. U.S. Const. art. I, § 9, cl. 7.
292. 50 U.S.C. § 3506(a)(1).
293. See Fisher, *supra* note 177, at 206–14; see also Franck & Weisband, *supra* note 283, at 115–16; Lawrence Rosenthal, *The Statement and Account Clause as a National Security Freedom of Information Act*, 47 Loy. U. Chi. L.J. 1, 3–59 (2015).
294. See Ron Wyden, Mark Udall & Martin Heinrich, *End the N.S.A. Dragnet, Now*, N.Y. Times, Nov. 26, 2013, at A25.

Chapter 4. The Personnel Power

1. Mass. Const. of 1780, pt. 1, art. 30.
2. Clayton Roberts, *The Growth of Responsible Government in Stuart England*, at viii (1966).
3. Vernon Bogdanor, *The Monarchy and the Constitution* 14 (1995).
4. See Theodore F.T. Plucknett, *Taswell-Langmead's English Constitutional History* 164–65 (11th ed. 1960).
5. Roberts, *supra* note 2, at 7–8.
6. Plucknett, *supra* note 4, at 170–71.
7. *Id.* at 191–92.
8. See Samuel Rezneck, *The Early History of the Parliamentary Declaration of Treason*, 42 Eng. Hist. Rev. 497, 509–10 (1927).
9. Roberts, *supra* note 2, at 8.
10. 1 Sir James Fitzjames Stephen, *A History of the Criminal Law of England* 158 (London, Macmillan 1883); see also Raoul Berger, *Impeachment: The Constitutional Problems* 29–30 (1974); Roberts, *supra* note 2, at 2–3.
11. See Josh Chafetz, “In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation”: Late Tudor Parliamentary Relations and Their Early Stuart Discontents, 25 Yale J.L. & Human. 181 (2013).
12. Roberts, *supra* note 2, at 5.
13. 1 Edward Coke, *Institutes* bk. 1, ch. 2, § 13, *19b (1628) (“[I]t is a maxime in Law, That the King can doe no wrong.”).
14. 3 William Blackstone, *Commentaries* *254–55.
15. See Roberts, *supra* note 2, at 1, 18; Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev. 1083, 1100 (2009); William R. Stacy, *Impeachment, Attainder, and the ‘Revival’ of Parliamentary Judicature under the Early Stuarts*, 11 Parl. Hist. 40, 41–46 (1992).
16. See Chafetz, *supra* note 11, at 197–98.
17. William Carr, *Michell, Francis* (b. c.1556, d. in or after 1628), Oxford Dict. Nat’l Biog. (Sean Kelsey rev., 2008), <http://www.oxforddnb.com/view/article/18655>; Sidney Lee, *Mompesson, Sir Giles* (1583/4–1651x63), Oxford Dict. Nat’l Biog. (Sean Kelsey rev., 2008), <http://www.oxforddnb.com/view/article/18932>; Markku Peltonen, *Bacon, Francis, Viscount St Alban* (1561–1626), Oxford Dict. Nat’l Biog. (2007), <http://www.oxforddnb.com/view/article/990>.
18. See Roberts, *supra* note 2, at 29.
19. *Id.* at 31.

Chairman YARMUTH. Thank you for your testimony, and I will recognize Professor Pasachoff for five minutes.

**STATEMENT OF ELOISE PASACHOFF, ASSOCIATE DEAN AND
AGNES N. WILLIAMS RESEARCH PROFESSOR, GEORGETOWN
LAW**

Ms. PASACHOFF. Chairman, Ranking Member Womack, and Members of the Committee, thank you for the invitation to testify today.

I would like to make three points this morning. First, presidents have many tools to shape spending after the appropriations process in Congress has come to an end. And in general, these tools play a useful role in ensuring efficient spending of taxpayer dollars within the bounds of the law.

Second, like any tool of implementation, these tools can be misused, and they recently have been.

Third, there are a number of opportunities for Congress to cabin the misuse of these tools while still recognizing their value in the ordinary case.

And in the rest of my time, I will illustrate these points by walking through recent experiences with three key Presidential budget tools.

The first tool that I will discuss is apportionment under the Antideficiency Act. This is the authority to specify by time period and by project, how agencies may spend their appropriations.

The purpose of apportionment is effective funds management; it is not an independent source of executive policy development. But the current Administration seems to be developing an expansive view of apportionment as a tool of Presidential control.

The most prominent example of this occurred last summer, when OMB placed holds on some foreign aid funding, including to Ukraine. Now, these apportionments became central to the impeachment inquiry, but that is a completely different issue from the one that concerns us today, which is the Administration's broad view of its apportionment power.

In defending these apportionments, OMB attempted to place the President's apportionment authority in the context of his constitutional duty, to take care that the laws be faithfully executed. But as GAO correctly explained, faithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law.

So Congress could usefully clarify these limits on apportionment, and it could also require that apportionments be made public, rather than letting the executive keep them secret.

The second tool I will discuss is rescission and deferral under the Impoundment Control Act. Congress passed this act to limit Presidential attempts to unilaterally withhold funds, sometimes called policy impoundments.

Under this act, a president who wants to cancel certain spending must make a rescission proposal to Congress, and Congress must affirmatively pass a rescission bill within 45 session days or the president must release the funds. And a president who wants to defer certain spending for operational reasons, not for policy reasons, must tell Congress about the delay.

Here, too, the Administration is engaging in expansive interpretation of Presidential authority. On rescission, the OMB has claimed that the act permits the President to unilaterally cancel any spending he wishes if Congress does not have time to act on a rescission proposal before the end of the fiscal year.

But this is not right as GAO has explained. To read the act to allow the Administration to cancel spending without congressional approval is to ignore the limits that the law clearly places on Presidential efforts to impound funds.

The Administration's expansive view of deferral is no stronger. It has tried to expand a category that GAO has distinguished from deferral called "a programmatic delay." And the Administration has essentially argued that something is a programmatic delay whenever the President says it is.

It is also argued that executive branch policy decisions can justify a programmatic delay. But again, this just is not right. OMB's reading would allow the category of programmatic delay which is not even mentioned in the Impoundment Control Act; it clips the controls that Congress put on—put in place in that act.

OMB's reading would also mean that the Administration is the only one policing itself for compliance with the Impoundment Control Act, which again, is not how the rule of law operates. Congress could usefully reject both of these arguments with amendments to the Impoundment Control Act.

The last tool I will discuss is transfer and reprogramming. A transfer moves funds between different appropriations while a reprogramming changes the allocation of funds within a single appropriation. And here, too, the Administration is taking a particularly broad view under these authorities.

It has been actively using these tools, not just through the emergency declaration and not just in building the wall, but more generally, in other areas of domestic and foreign policy as well.

The lack of transparency in these actions, too, makes it difficult to monitor and hold the executive branch accountable so Congress could, again, usefully place more specific restrictions on transfer and reprogramming, and could also require more transparency around the use of these tools.

Thank you for your time and your attention to these important issues.

[The prepared statement of Eloise Pasachoff follows:]

Testimony of Eloise Pasachoff
Professor of Law
Georgetown University Law Center
before the U.S. House of Representatives
Committee on the Budget
Hearing on
Protecting Congress's Power of the Purse and the Rule of Law
March 11, 2020

Chairman Yarmuth, Ranking Member Womack, and Members of the Committee:

Thank you for the invitation to testify before you today. My name is Eloise Pasachoff. I am a Professor of Law at the Georgetown University Law Center, where I hold an Agnes N. Williams Research Professorship and am currently serving as Associate Dean for Careers. I am also a public member of the Administrative Conference of the United States, an independent federal agency charged by Congress with convening experts from the public and private sectors to recommend improvements to administrative process and procedure. I am here today speaking for myself, however; the views I will share during my testimony are my own and are not attributable to any institution with which I am affiliated.

My scholarship focuses on the administrative law of federal funding—especially, as relevant for today's hearing, executive branch tools to shape federal spending after the appropriations process has come to an end in Congress and appropriations have been signed into law. I have published on this topic in the *Yale Law Journal*, in the *Columbia Law Review*, and in a forthcoming edited volume with the Brookings Institution Press.¹ I am honored to be invited to discuss these critical issues with you at this hearing.

I want to make three points this morning:

First, presidents have many tools with which they can shape federal spending during the process of “budget execution,” the implementation process after appropriations have been signed into law. These presidential budget tools play an important role in a well-functioning government. It is not possible for Congress to anticipate every need that will arise over the course of a fiscal year. Presidents therefore need some degree of flexibility to respond in timely, sensible ways to ensure efficient and effective spending of taxpayer dollars within the bounds of appropriations law and budget statutes.

¹ I am drawing on two of these publications for my remarks today. See Eloise Pasachoff, *The President's Budget Powers in the Trump Era*, in *PRIORITIZING PRESIDENTIAL POLICIES: HOW DOES THE OFFICE OF MANAGEMENT AND BUDGET INFLUENCE EXECUTIVE POLICY MAKING?* (eds. Bose and Rudalevige, forthcoming Brookings Institution Press 2020); Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 *YALE LAW JOURNAL* 2182 (2016).

Second, like any tool of implementation, these presidential budget tools can be misused. They can be misused by offering interpretations of statutory language that stretch its plain meaning; by disregarding the clear intent of Congress as demonstrated by the context in which Congress originally enacted the law and decades of practice that has grown up around it; and by generally aggrandizing presidential authority as compared to congressional authority over spending.

Third, there are a number of opportunities for Congress to cabin the misuse of presidential budget tools while recognizing the value of these tools in the ordinary case. Several amendments to the two key statutes, the Antideficiency Act and the Impoundment Control Act, would help promote transparency and close loopholes. So would ongoing attention in appropriations acts to cabin executive branch authority to reprogram and transfer funds for purposes other than the ones Congress originally authorized. It would be better for everyone of both parties and both branches to clarify these subjects of recent debate.

In the rest of my time, I want to walk through three presidential budget tools that are especially pervasive, consequential, and opaque. I'd like to briefly explain what they are, why they are important, how they have recently been misused, and how Congress could usefully adjust them to recalibrate the balance between executive and legislative control over spending, both now and for any future administration.

Presidential Budget Tool #1: Apportioning Appropriated Funds

Legal framework. One of the central tools of budget execution is “apportionment,” the authority to specify by time period and by project how agencies may spend their appropriations. The governing law for apportionments is the Antideficiency Act, which provides that the President “shall apportion in writing” appropriations before agencies have access to any funds.² The Office of Management and Budget (OMB) has long been delegated this task, which is typically conducted by a senior civil servant.³ The purpose of apportionment is effective funds management.⁴ The Antideficiency Act dates back to 1870, when Congress tried to stop what had been a common executive branch practice of intentionally spending appropriations quickly and then coming back to Congress to demand more.

Today's apportionment authority gives the White House a powerful tool of control over agencies because of the regularity with which OMB must review apportionments—at least four times each year—and because OMB may use its discretion to specify how the agency must spend its appropriation in more detail than Congress did.⁵ Moreover, OMB's apportionments have the force of law under the Antideficiency Act, which spells out administrative or even criminal consequences for government employees who violate the Act.⁶

At the same time, this control is not unfettered. Apportionment may not be used to

² 31 U.S.C. § 1513(b).

³ OMB Circular A-11 § 120.1.

⁴ 31 U.S.C. §§ 1512(a), (b)(2).

⁵ 31 U.S.C. § 1512(d).

⁶ 31 U.S.C. §§ 1349, 1350.

withhold sums from programs the administration does not like. The Antideficiency Act specifies narrow grounds on which an apportionment may reserve funds, and all reserves must be reported to Congress.⁷ Nor does the Antideficiency Act treat the power to apportion as an independent source of executive policy development. In fact, Congress narrowed the apportionment power in the wake of President Nixon's efforts to do just this.⁸ Moreover, Congress has tasked the Government Accountability Office (GAO) with issuing decisions on the propriety of certain executive branch actions under appropriations law in light of the Antideficiency Act and other statutes.⁹

Current issues. While OMB exercises its apportionment authority all the time, and most uses reflect unremarkable authority to ensure efficient funds management in agencies, the current administration seems to be developing an expansive view of the apportionment power as a tool of presidential control. The most significant and controversial effort to use apportionment to further the administration's goals occurred last summer, when OMB placed holds on State, USAID, and Department of Defense foreign aid funding, including to Ukraine.

As you know, these apportionments, and debates about the underlying reasons for them, ended up giving rise to the impeachment votes in the House and Senate. But the relevance of the apportionments for impeachment is a completely different question from the one that concerns us today: the administration's broad view of its apportionment power.

In defending the apportionments, OMB attempted to place the President's statutory apportionment authority in the context of his constitutional duty to "take Care that the Laws be faithfully executed."¹⁰ OMB called "pausing before spending a necessary part of program execution" so that OMB can confirm and approve agencies' plans. In so doing, OMB seemed to contemplate the use of apportionment authority for policy reasons, ignoring Congress's Nixon-era rejection of this rationale.¹¹ But as GAO correctly explained, "Faithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law."¹² GAO cited for this proposition a Supreme Court case that had rejected President Clinton's efforts to unilaterally decline to spend money Congress had appropriated.¹³

To my mind, ensuring that presidents don't abuse the apportionment power is not a partisan issue. And in fact, as you know, while Republicans and Democrats in Congress ultimately divided on the relevance of the President's actions to the question of impeachment, there was immediate bipartisan congressional opposition to the administration's holds on the Ukraine aid, and the funding was ultimately released.

⁷ 31 U.S.C. § 1512(c).

⁸ GAO, *Principles of Federal Appropriations Law* 3d ed. Vol. II (2006, updated 2015), at 6-122-6-125.

⁹ 31 U.S.C. §§ 712, 3526, 3529; GAO, *Principles of Federal Appropriations Law* 4th ed. (2016), at 1-12-1-17.

¹⁰ Letter from General Counsel of OMB to General Counsel of GAO (hereinafter 2019 OMB Letter), Dec. 11, 2019, at 3.

¹¹ *Id.* at 5.

¹² GAO, B-331564, *Office of Management and Budget—Withholding of Ukraine Security Assistance*, January 16, 2020 (hereinafter GAO Ukraine Decision), pp. 1, 5.

¹³ *Clinton v. City of New York*, 524 U.S. 417 (1998).

For me, the key legal takeaway from this episode is the importance of transparency. It is only because these apportionments happened to become public that Congress eventually learned about them. We don't know what other apportionments may have resulted in other policy-driven holds, in this or any other administration. In this way, the potential for abuse of the apportionment power is not simply about the current administration. Any future administration, Democratic or Republican, could also try to use the apportionment power as a regular tool of presidential control. And because apportionments aren't disclosed as a matter of course, it would be difficult for Congress and the American people to know what is going on unless the apportionment at issue happened to hit the news.

Potential reforms. To avoid these problems, several amendments to the Antideficiency Act would be helpful. To limit efforts to use apportionment to support presidential policymaking or partisan gain, Congress could clarify that the apportionment authority is not a general delegation of authority but is only for the purposes of efficient funds management. Congress could further explain what actions would and would not constitute efficient funds management. Further, to ensure that apportionments are kept within these bounds, Congress could require that signed apportionments be disclosed as a matter of course on OMB's website; they are final decisional documents with the force of law, and it is difficult to justify their current non-disclosed status in a rule of law regime.

Presidential Budget Tool #2: Rescinding, Deferring, and Impounding Funds

Legal framework. There is a second statute in addition to the Antideficiency Act that limits apportionment and the presidential spending power more generally: the Impoundment Control Act. Congress passed this Act in 1974 as part of an overhaul of the federal budget process in response to the Nixon administration's widescale refusal to spend appropriated funds.¹⁴ In an effort to limit "policy impoundments"—presidential attempts to withhold funds based on a policy disagreement with Congress—the Impoundment Control Act contains only two mechanisms for a president to withhold funds or delay spending: rescission and deferral.

Under rescission, the President proposes to cancel certain spending, and the reasons for doing so may include policy disagreements with Congress.¹⁵ But he cannot do so unilaterally; he must transmit a "special message," prepared by OMB, to Congress, and if Congress does not pass a rescission bill within 45 days, the administration must make the funds available as Congress had previously specified.¹⁶

Under deferral, the President proposes to delay spending specific sums of money; here, however, the proposed reasons may not include policy disagreements.¹⁷ The President must again transmit a special message prepared by OMB explaining the reasons for the proposed deferral.¹⁸ Congress then has the opportunity to consider an "impoundment resolution" through

¹⁴ Pub. L. No. 93-344, tit. X, codified at 2 U.S.C. § 681 et seq.

¹⁵ 2 U.S.C. § 683(a).

¹⁶ 2 U.S.C. §§ 682(3), 683(b).

¹⁷ 2 U.S.C. § 684(b).

¹⁸ 2 U.S.C. § 684(a).

streamlined procedures under which it “expresses its disapproval” but does not stop the delay, although the delay may last no longer than the current fiscal year.¹⁹

Current issues. The current administration is engaging in expansive interpretation of presidential authority under this Act, under two different lines of reasoning. One argument involves interpreting rescission implicitly to permit the President to unilaterally cancel any spending he wishes if Congress does not have enough time to act on a rescission proposal before the end of the fiscal year. OMB has asserted that because the Impoundment Control Act doesn’t explicitly say that the President can’t run out the clock on the fiscal year, he can.²⁰ In both of the last two summers, the administration took steps towards preparing a rescission package without enough time for Congress to act before the end of the fiscal year, both times targeting foreign aid accounts, with the idea of letting the funds expire. In both years, bipartisan congressional opposition led the administration to drop the effort. But OMB has persisted in its legal interpretation, even though GAO has concluded that OMB’s interpretation is wrong.²¹

GAO has the better argument here. The plain text of the Impoundment Control Act provides only one circumstance under which the administration can entirely decline to spend appropriated funds: if Congress has agreed to rescind the funds in question within the 45-day window. To read the Act to allow the administration to cancel spending without congressional approval is to ignore the limits the law clearly places on presidential efforts to impound funds. OMB’s reading imagines that Congress would give away its fundamental power of the purse without saying so explicitly. But this reading is just not plausible. In Justice Scalia’s memorable words, which GAO quotes at the end of its analysis, Congress does not “hide elephants in mouseholes.”²²

A second expansive argument under the Impoundment Control Act offered by the administration concerns deferral. GAO has long recognized a category of delay in spending funds that doesn’t count as an unlawful deferral: what it calls “programmatic delays.” “A programmatic delay,” GAO explains, “is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency’s reasonable and good faith efforts to implement the program.”²³ OMB’s current attempt to expand this category includes two different points: that the executive branch’s assertion that it is engaging in a permissible programmatic delay should be taken at face value, without further probing intent or underlying circumstances, and that internal executive branch policy considerations can justify a programmatic delay.²⁴ This was the argument the administration offered in an attempt to justify the apportionment holds on the Ukraine funding. These weren’t unlawful deferrals, the

¹⁹ 2 U.S.C. §§ 682(4), 688.

²⁰ Letter from General Counsel of OMB to General Counsel of GAO, Nov. 16, 2018.

²¹ GAO B-330330, Letter to The Honorable Steve Womack, Chairman, Committee on the Budget, House of Representatives, and The Honorable John Yarmouth, Ranking Member, Committee on the Budget, House of Representatives, *Impoundment Control Act—Withholding of Funds through Their Date of Expiration*, Dec. 10, 2018, at 1–2.

²² *Id.* at 12 (citing *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001)).

²³ GAO, *Principles of Federal Appropriations Law*, *supra* note 9, at 2-50.

²⁴ 2019 OMB Letter, *supra* note 10, at 7–9.

administration argued, but rather simply programmatic delays to ensure consistency with the President's foreign policy.²⁵

GAO rejected this reading both as a matter of law and as applied to the facts of the Ukraine holds. Again, GAO has the better argument. As a matter of law, GAO explained that programmatic delays are permissible only “because of factors external to the program,” and where the agency is otherwise “taking necessary steps to implement” it. Such delays are not permissible where the executive branch delays spending “to ensure compliance with presidential policy prerogatives.”²⁶ This is correct. To allow otherwise would let the category of programmatic delay—which is not even mentioned in the Impoundment Control Act at all—eclipse the tight controls on executive branch delays in spending money that Congress put in place in that Act. OMB's reading would also mean that the administration is the only one policing itself for compliance with the Impoundment Control Act, where a hold on spending money becomes an acceptable programmatic delay just because the administration says so. That is just not how the rule of law operates. GAO thus correctly concluded that the holds on the Ukraine apportionments did not constitute permissible programmatic delays because it was OMB's own direction, not any external factor, that caused the delay, and because the program's execution was already underway when OMB decided to halt it.²⁷

Potential reforms. Just as amendments to the Antideficiency Act would help avoid—in this or any future administration—presidential misuse of apportionment, so would amendments to the Impoundment Control Act help avoid abuses of rescission and deferral. To avoid unilateral administrative cancellation of funds, Congress could clarify that the Act does not permit rescission proposals that would allow funds to expire at the end of the fiscal year if Congress does not act in time. To cabin administrative efforts to avoid the Act by labeling any apportionment hold a programmatic delay, Congress could develop a clear definition of that term that distinguishes it from a deferral. To make violating the Impoundment Control Act just as serious as violating the Antideficiency Act, Congress could import into the former Act the potential administrative and criminal penalties currently reserved for the latter.

Presidential Budget Tool #3: Transferring and Reprogramming Funds

Legal framework. If the Impoundment Control Act represents congressional limits on the executive's ability to withhold money, the appropriations concepts of “transfer and reprogramming” represent congressional authority for the executive to change the terms on which appropriations are made.²⁸ The idea behind this authority is that Congress cannot always specify with enough knowledge of future events exactly how funds should be spent, and so the executive branch needs some ability to modify spending as circumstances change.

Both transfer and reprogramming involve changing the funding allocations set forth in a given appropriations law, but the two terms have different definitions and legal frameworks. A

²⁵ *Id.* at 9.

²⁶ GAO Ukraine Decision, *supra* note 12, at 7.

²⁷ *Id.*

²⁸ GAO, *Principles of Federal Appropriations Law*, *supra* note 9, at 2-38–2-47; Congressional Research Service, *Transfer and Reprogramming: An Overview of Authorities, Limitations, and Procedures*, June 6, 2013.

transfer moves funds between different appropriations, and an agency may transfer funds only with specific statutory authority.²⁹ In contrast, a reprogramming changes the allocation of funds within a single appropriation, and an agency is generally free to reprogram funds as long as it does so consistent with the relevant appropriations act's restrictions and any other legal requirement specific to that funding.³⁰ There is one set of these restrictions that acts as a restriction only by custom rather than by law: the practice of requiring committee approval before a reprogramming can take place. After the Supreme Court's 1983 decision *INS v. Chadha*, committee approval can be a strongly encouraged *practice* as part of the relationship between the executive and legislative branches, but as a *requirement* it would not be consistent with the Constitution's framework for legislation.³¹

Current issues. Exercising reprogramming and transfer authority always reflects centralized executive branch control, in that OMB oversees agency efforts to transfer and reprogram funds. But the current administration is taking a particularly broad view of this presidential authority in size, in scope, and in rejecting congressional oversight. The administration's use of transfer and reprogramming to build the wall at the southern border has received the most attention, but it has also used transfer and reprogramming to support many other goals in both domestic and foreign policy. It has done so even in the face of bipartisan congressional opposition. After reaching an agreement on fiscal 2019 appropriations that ended last year's 35-day government shutdown—an agreement that did not include \$5 billion the President had requested for the wall—the President went on to use transfer and reprogramming to obtain even more than he had originally requested for the wall, in part through a declaration of emergency but in part through ordinary use of transfer and reprogramming authority. After Congress voted to overturn the President's emergency declaration, the President vetoed the resolution, and there were not enough votes to override the veto.

One of the reasons that congressional limits on transfer and reprogramming authority have bite is that it is generally understood that an executive branch that disregards congressional limits will face repercussions in the next appropriations cycle. The administration seems to have been gambling that it would not face repercussions in the 2020 appropriations process. That gamble seems to have paid off. For example, the 2020 appropriations acts signed into law in December did not contain any further restrictions on the administration's actions around the wall. And shortly after that deal was signed, the administration announced a new plan to shift an additional \$7 billion in the Pentagon's 2020 appropriations towards building the wall.

This is a dangerous precedent for Congress's power of the purse. It shows any future administration, Democratic or Republican, that it is possible to make a budget request, have that budget request be denied, accomplish the purposes of that budget request anyway by moving money around through transfer and reprogramming, and then face no consequences in the next year's appropriations cycle.

²⁹ 31 U.S.C. § 1532; GAO, *Principles of Federal Appropriations Law*, *supra* note 9, at 2-38.

³⁰ *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); GAO, *Principles of Federal Appropriations Law*, *supra* note 9, at 2-44.

³¹ 462 U.S. 919, 944-51 (1983).

Moreover, the lack of transparency around transfers and reprogramming makes it difficult to monitor the executive branch's actions. Different committees have different notification requirements and different practices with respect to sharing information about transfers and reprogramming with all of Congress and with the public at large. There is no comprehensive collection of transfers and reprogramming. This lack places Congress at an informational disadvantage as compared to the executive branch.

Potential reforms. The underlying rationale for transfer and reprogramming—the need for executive flexibility as circumstances change—remains valid, so a generalized set of limits is not what is needed. Instead, Congress could impose more specific restrictions on different accounts in annual appropriations laws. When the executive branch acts to exceed these restrictions, it would make sense for the subsequent year's appropriation to respond in a meaningful way. Congress could also require regular and public disclosure of all administration reprogramming and transfer actions in some centralized fashion. As with apportionments, these final decisional documents ought not to be relegated to occasional, piecemeal, targeted releases.

Conclusion

There are a number of important steps that Congress can take to protect its power of the purse and the rule of law while maintaining the flexibility required for executive discretion in a healthy system. Thank you for the opportunity to share my views with you today.

Chairman YARMUTH. Thank you very much.
I now recognize Mr. Armstrong for five minutes.

**STATEMENT OF THOMAS H. ARMSTRONG, GENERAL COUNSEL,
U.S. GOVERNMENT ACCOUNTABILITY OFFICE**

Mr. ARMSTRONG. Good morning. Thank you, Mr. Chairman, Ranking Member Womack, and Members of the Committee for this opportunity to speak with you about the work we do at GAO.

Since GAO was established in 1921, we have prepared audits, investigations, and legal decisions for the Congress. What I want to focus on this morning are the—is the legal work we do, the legal decisions that we issue.

We do a number of things in this area that—and it is all designed to support your constitutional prerogatives of the purse. We issue decisions to Members of Congress and Committees of Congress. We issue decisions to executive branch officials; in fact, some executive branch officials have a statutory right to a decision from GAO and that is very important because it is through our decisions that we establish standards to ensure compliance with the appropriations acts and with fiscal statutes. We are kind of on the front line for the Congress.

We also have responsibilities under the Antideficiency Act. For example, we maintain the official repository of reports by executive agencies of ADA violations, and we report annually to the Congress on what we have found in the previous fiscal year. And shortly, you will be getting a report from us about Fiscal Year 2019.

As I think everybody knows by now, we have certain very significant responsibilities under the Impoundment Control Act. Another thing that we do, and this is where we help the Congress make sure that things are running as they should be in the executive branch is, we have something that we call the “Red Book.” It is the “Principles of Federal Appropriations Law”; it is a multi-volume treatise on appropriations law.

It is called the Red Book because in hard cover, it is red, and you know, attorneys are kind of clever like that. So it is the Red Book. But that is a compendium of 99 years of case law based on 99 years of experience and expertise, and that is regularly referred to throughout the executive branch, and it is referred in—by the federal judiciary.

There are some things that have happened in the past few years that I think would compel legislative action on your part that would strengthen our role. Because if you strengthen our role, you are really strengthening your oversight of executive spending activity and we can provide you information, legal views, legal conclusions that I think are so very important to you as you work through the appropriations process and you make choices. I think it is important to you as you carry out your own oversight of executive activity.

Mr. Yarmuth, you and Mr. Womack may remember that a little over a year ago, you asked us for an opinion whether the Impoundment Control Act allowed a president to propose a rescission during the last 45 days of a Fiscal Year when the money that would be proposed for rescission would expire by operation of law before the end of that 45 day period.

We said, no, that the Administration did not have the authority to do that, and that is something where you might want to make clear in the Impoundment Control Act. We do have recent experience where the current make-up of the Office of Management and Budget has advised executive general counsels that they do not need to listen to GAO's decisions and opinions. So to ensure this, you can put it in law.

In that regard, something else that I would mention is that OMB regularly gives instructions annually to federal agencies on the budget process, and specifically, on the Antideficiency Act. Until last summer, OMB, for decades, had instructed agencies if GAO concludes that you violated the Antideficiency Act, you need to report that violation. You can and should report your disagreement with violation if you disagree, but you should report it.

Last summer, OMB revised that instruction and said you only have to report a violation if we, OMB, and you, the agency, agree with GAO.

So we sent a letter to executive general counsels and said if we conclude that there is a violation of the Antideficiency Act, and you do not report it, we are reporting it. I think that is information that the Congress should have as the Congress oversees executive spending, and as the Congress makes its choices in the appropriations process.

And if I could take just one more minute, one other point I would make is some years ago, the Office of Legal Counsel over at the Department of Justice basically told agencies if you violate a spending restriction and that spending restriction was enacted by Congress into permanent law, as opposed to an appropriations act, you do not need to report that violation to Congress.

In effect, it is a rather anomalous policy of Congress gets information depending on the legislative vehicle Congress has chosen. If it is in an appropriations act, the Office of Legal Counsel says you have to report it. If the restriction is not in an appropriations act, you do not have to report it. And again, when we uncover things like that, we do report it.

I am going to read a quote because when I think about these legislative ideas we have, and when I think about the topic with—of this hearing, I am reminded again, James Madison in the Federalist Papers in 1788, when he was talking about the power of the purse and that it should be housed in the legislature. He made the point that allowing it in the legislature will help reduce “all the overgrown prerogatives of the other branches of government.” I think that is the power of the purse.

Thank you very much and I am sorry for going over time.

[The prepared statement of Thomas H. Armstrong follows:]



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

B-331902
GAO-20-495T

March 11, 2020

The Honorable John Yarmuth
Chairman
The Honorable Steve Womack
Ranking Member
Committee on the Budget
House of Representatives

Subject: *Testimony before the House Committee on the Budget—Congress's Constitutional Power of the Purse and the Government Accountability Office's Role to Serve that Power*

Chairman Yarmuth, Ranking Member Womack, and Members of the Committee:

Thank you for the opportunity to discuss Congress's constitutional power of the purse and GAO's role in serving this power.

The Role of the Government Accountability Office

The framers vested Congress with the power of the purse by providing in the Constitution that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."¹ As James Madison explained, the framers did so for two primary reasons.² First, this arrangement ensured that the government remained directly accountable to the will of the people: "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."³ Second, Congress through its power of the purse holds a key check on the power of the other branches, allowing it to reduce "all the overgrown prerogatives of the other branches of government."⁴

¹ U.S. Const., art. I, § 9, cl. 7.

² The Federalist No. 58 (1788) (James Madison).

³ *Id.*

⁴ *Id.*

The meaning of the Appropriations Clause is straightforward: “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”⁵ Congress’s power of the purse vests in Congress the power and duty to affirmatively authorize all expenditures,⁶ and the Constitution provides Congress with the power to enact statutes to protect and exercise this power.⁷ Congress has largely done this through the annual budget and appropriations process and a series of permanent statutes that establish controls on the use of appropriated funds. The permanent fiscal statutes, found mostly in title 31 of the United States Code, implement Congress’s power of the purse.⁸

In 1921, Congress created the General Accounting Office—now the Government Accountability Office—through the Budget and Accounting Act to assist it in the discharge of its core constitutional powers, including the power of the purse.⁹ Congress created this independent, nonpartisan office in the legislative branch “because it believed that it ‘needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations.’”¹⁰ The Budget and Accounting Act vested GAO with the authority to “investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds”¹¹ In addition, this Act transferred from the Comptroller of the Treasury to the Comptroller General the authority to issue legal decisions to executive branch officials concerning the use and availability of public money.¹²

⁵ *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (citing *Reeside v. Walker*, 52 U.S. 272, 291 (1851)).

⁶ U.S. Const., art. I, § 9, cl. 7.

⁷ U.S. Const., art. I, § 8, cl. 18.

⁸ See, e.g., 31 U.S.C. §§ 1301, 1341.

⁹ Budget and Accounting Act, 1921, Pub. L. No. 13, title III, 42 Stat. 20, 23–27 (June 10, 1921). See 61 Cong. Rec. 1090 (1921) (statement of Rep. Good) (“It was the intention of the committee that the comptroller general should be something more than a bookkeeper or accountant; that he should be a real critic, and at all times should come to Congress, no matter what the political complexion of Congress or the Executive might be, and point out inefficiency, if he found that money was being misapplied—which is another term for inefficiency—that he would bring such facts to the notice of the committees having jurisdiction of appropriations.”).

¹⁰ *Bowsher v. Synar*, 478 U.S. 714, 730–731 (1986) (quoting Harvey Mansfield, *The Comptroller General: A Study in the Law and Practice of Financial Administration*, 65 (1939)).

¹¹ Pub. L. No. 13, § 312(a), 42 Stat. at 25, codified at 31 U.S.C. § 712(1).

¹² Pub. L. No. 13, § 304, 42 Stat. at 24, codified at 31 U.S.C. § 3529(b).

Over the past century, Congress has continued to vest GAO with additional responsibilities to investigate and oversee the use of public money. For example, under the Congressional Budget and Impoundment Control Act of 1974, Congress provided that the Comptroller General will review any special messages submitted by the President pursuant to the act and report to Congress when a special message is either improperly classified or not transmitted at all.¹³ And, in 2004, Congress amended the Antideficiency Act to require agencies to send to the Comptroller General a copy of each violation report on the same date the agency sends the report to the President and Congress.¹⁴ Additionally, the Senate Appropriations Committee directed the Comptroller General to establish a central repository of Antideficiency Act violation reports and to track all reports, including responses to GAO legal decisions and opinions and findings in audit reports and financial statement reviews.¹⁵

Today, through these various statutory grants of authority, GAO continues to assist Congress in the discharge of its constitutional powers. GAO does much of this work through audits and investigations, either at the request of Congress or the Comptroller General.¹⁶ In addition, GAO issues legal decisions on matters of appropriations law in response to congressional requests or requests from executive branch agencies, or under the Impoundment Control Act.

In the past year, GAO has issued decisions on a number of appropriations law matters, including, for example: whether actions taken during the fiscal year 2019 lapse in appropriations violated the Antideficiency Act and other fiscal statutes;¹⁷ whether the Department of Housing and Urban Development violated the Antideficiency Act when it failed to notify Congress in advance of obligating funds to furnish the Secretary's office;¹⁸ and whether the Environmental Protection Agency violated the anti-lobbying provision, and therefore the Antideficiency Act, when an agency official tweeted about the Senate confirmation of an official to the position of Deputy Administrator.¹⁹ In addition to issuing these decisions, GAO publishes a multivolume treatise titled *Principles of Federal Appropriations Law* (often referred to as the "Red Book"), which is the premier reference on appropriations law matters for members of Congress and their staffs, agency practitioners, the federal judiciary, and for those outside of the federal government. We also teach a course on appropriations law at agencies across the

¹³ 2 U.S.C. §§ 685–686.

¹⁴ Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004), *codified at* 31 U.S.C. § 1351.

¹⁵ S. Rep. No. 108-307, at 43 (2004).

¹⁶ 31 U.S.C. §§ 712, 717.

¹⁷ *See, e.g.*, B-330776, Sept. 5, 2019; B-330775, Sept. 5, 2019.

¹⁸ B-329955, May 16, 2019.

¹⁹ B-330107, Oct. 3, 2019.

federal government and each year we host over two hundred federal appropriations law practitioners at the daylong Appropriations Law Forum.

GAO's expertise with regard to appropriations law matters is widely understood and respected throughout the government. Indeed, Article III courts frequently cite to GAO's legal decisions and the Red Book in their decisions involving appropriations law. For example, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) relied on a line of decisions of the Comptroller General when it ruled that the Navy's appropriations were not available for the purchase of bottled water.²⁰ In support of its conclusion, the D.C. Circuit noted that these decisions are "expert opinion, which we should prudently consider."²¹ Additionally, the Supreme Court has cited GAO's Red Book in support of its positions on appropriations law matters.²²

GAO's Role in Serving Respect for Congress's Constitutional Power of the Purse

GAO's role to provide information and legal analysis to Congress on appropriations law matters is essential to ensuring respect for Congress's constitutional power of the purse. This is evident in Congress's grant of authority to GAO under both the Impoundment Control Act of 1974 (Impoundment Control Act) and the Antideficiency Act.

In 1974, Congress enacted the Impoundment Control Act in response to attempts by the executive branch to thwart the will of Congress by refusing to spend congressionally-appropriated funds.²³ The Impoundment Control Act operates on the constitutional premise that the President is required to obligate funds appropriated by Congress, unless otherwise authorized to withhold.²⁴ The act permits the President to temporarily impound—withhold the obligation of—appropriated funds in certain circumstances if the President notifies the Congress by transmitting a "special message."²⁵ The act gives the Comptroller General the responsibility to review all special messages submitted pursuant to the Impoundment Control Act and to report to Congress when the Comptroller General determines the President has improperly withheld funds.²⁶ The act also authorizes the Comptroller General to bring a civil action

²⁰ *Navy v. FLRA*, 665 F.3d 1339, 1342, 1349–1351 (D.C. Cir. 2012).

²¹ *Id.*, at 1349 (quoting *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001)).

²² See, e.g., *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 190–199 (2012).

²³ Pub. L. No. 93-344, title X, 88 Stat. 297, 332–339 (July 12, 1974), *classified at* 2 U.S.C. §§ 681–688.

²⁴ B-329092, Dec. 12, 2017.

²⁵ 2 U.S.C. §§ 681–688.

²⁶ *Id.* §§ 685–686.

to compel the release of any budget authority improperly withheld.²⁷ GAO's investigation of and reporting on potential impoundments alerts Congress to executive branch attempts to undermine Congress's power of the purse by refusing to spend budget authority appropriated by Congress. As a result, GAO's role under the Impoundment Control Act is essential to ensuring respect for Congress's constitutional power of the purse.²⁸

Congress enacted the Antideficiency Act to protect and underscore Congress's constitutional prerogatives of the purse in response to various abuses.²⁹ Prior to the enactment of this act, some agencies would spend their entire appropriations during the first few months of the fiscal year, continue to incur obligations, and then return to Congress for appropriations to fund these "coercive deficiencies."³⁰ These were obligations to others who had fulfilled their part of the bargain with the United States and who now had at least a moral—and in some cases also a legal—right to be paid. Congress felt it had no choice but to fulfill these commitments, but the frequency of deficiency appropriations played havoc with the United States budget. As a result, Congress enacted the Antideficiency Act, which, in pertinent part, prohibits government officials from obligating or expending in excess of or in advance of appropriations.³¹ The Antideficiency Act has been termed "the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds."³²

To further protect its constitutional prerogatives under the Antideficiency Act, Congress amended the Antideficiency Act in 2004 to require agencies to transmit copies of each violation report to GAO on the same date the agency reports the violation to the President and Congress.³³ Additionally, the Senate Appropriations Committee directed the Comptroller General to establish a central repository of Antideficiency Act violation reports.³⁴ Since then, if GAO concludes that an agency violated the Antideficiency Act in a decision and if the agency does not make its required report, we notify Congress of

²⁷ *Id.* § 687.

²⁸ B-331564, Jan. 16, 2020.

²⁹ See U.S. Const., art. I, § 9, cl. 7 (power of the purse, statement and account of public money); B-328450, Mar. 6, 2018; B-317450, Mar. 23, 2009.

³⁰ Gary Hopkins & Robert Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 57–58 (1978); Louis Fisher, *Presidential Spending Power*, 232 (1975).

³¹ 31 U.S.C. § 1341(a)(1)(A).

³² Hopkins & Nutt, *at* 56.

³³ Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004).

³⁴ S. Rep. No. 108-307, at 43 (2004).

the violation.³⁵ GAO's reports on these violations help Congress learn which agencies have violated the Act and whether Congress needs to take additional action to ensure compliance with both the Antideficiency Act and its power of the purse.

When GAO finds that an agency has violated a fiscal statute, Congress may use its legislative powers to enforce GAO's decision and protect its power of the purse. For example, in 2011, the Department of Justice's Office of Legal Counsel issued a memorandum asserting that the Office of Science and Technology Policy (OSTP) did not violate a statutory provision prohibiting the use of appropriated funds "to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract . . . with China or any Chinese-owned company" when OSTP used appropriated funds to conduct the prohibited activities because OSTP conducted them in furtherance of the President's constitutional powers.³⁶ Weeks later, GAO issued a legal decision finding that OSTP violated this statutory provision and, therefore, also violated the Antideficiency Act.³⁷ Congress subsequently reduced OSTP's appropriations by about 33 percent.³⁸

In addition, in 2014, GAO concluded that the Department of Defense violated a statutory provision when it transferred five individuals detained at Guantanamo Bay, Cuba, to the nation of Qatar without providing the statutorily required notice 30 days in advance to certain congressional committees.³⁹ Without the notice, no money was legally available for this purpose and DOD violated the Antideficiency Act.⁴⁰ The House of Representatives subsequently voted 249-163 to condemn and disapprove of DOD's actions.⁴¹

³⁵ See, e.g., B-308715, Nov. 13, 2007.

³⁶ Memorandum Opinion for the General Counsel, Office of Science and Technology Policy, *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, OLC Opinion, Sept. 19, 2011.

³⁷ B-321982, Oct. 11, 2011.

³⁸ *Compare* Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, div. B., title III, 125 Stat. 552, 622 (Nov. 18, 2011) (providing OSTP with \$4.5 million for its FY 2012 expenses), *with* Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, div. B, title III, § 1316, 125 Stat. 38, 125 (Apr. 15, 2011) (providing OSTP with \$6.660 million for its FY 2011 expenses).

³⁹ B-326013, Aug. 21, 2014.

⁴⁰ *Id.*

⁴¹ H. Res. 644, 113th Cong. (2014); 160 Cong. Rec. H7325, H7335 (2014).

The Gravity of GAO's Role

GAO takes seriously its role in protecting Congress's power of the purse. In 2018, for example, we reminded the executive branch that affirmative legislative action is required for a rescission of funds, noting that Congress does not "alter the fundamental details of its constitutional power of the purse through vague terms or ancillary provisions."⁴² Recently, we warned agencies that their reluctance to provide fulsome responses to GAO's questions can have constitutional significance.⁴³

During the fiscal year 2019 lapse in appropriations, executive branch agencies, in some cases, continued a number of activities that they had not undertaken in prior lapses. These executive branch agencies incurred obligations without the prior approval of Congress, in contravention of Congress's power of the purse. Congress was understandably concerned about the executive branch's actions and asked GAO to assess the legality of a number of these actions. Over the past few months, GAO has issued a number of decisions on the executive branch's actions under the lapse.⁴⁴ To date, all but one of the decisions we issued have concluded that the executive branch did not have the legal authority to carry out the activities it undertook during the lapse.⁴⁵ In many of these decisions, we also noted that the executive branch's disregard for the Antideficiency Act and other fiscal statutes during the lapse tore at the very fabric of Congress's constitutional power of the purse, and, as a result, we would consider the continuation of such activities in a future lapse to be a knowing and willful violation of the ADA.⁴⁶

In late 2018, Chairman Yarmuth and Ranking Member Womack asked GAO whether the President had the legal authority under the Impoundment Control Act to withhold budget authority through its date of expiration.⁴⁷ We issued a decision concluding the President did not have such authority.⁴⁸ An interpretation of the act under which the President has the legal authority to withhold budget authority through its date of expiration would allow the President to effectively rescind budget authority without

⁴² B-330330, Dec. 10, 2018, at 12.

⁴³ B-331564, Jan. 16, 2020. See *also* B-330776, Sept. 5, 2019 (GAO "will not allow an agency's lack of cooperation to interfere with Congress's oversight of executive spending.").

⁴⁴ See, *e.g.*, B-331132, Dec. 19, 2019; B-331093, Oct. 22, 2019; B-330693, Oct. 8, 2019; B-331094, Sept. 5, 2019; B-330776, Sept. 5, 2019; B-330775, Sept. 5, 2019.

⁴⁵ *Id.*

⁴⁶ *E.g.*, B-330776, Sept. 5, 2019.

⁴⁷ B-330330, Dec. 10, 2018.

⁴⁸ *Id.*

congressional action.⁴⁹ Such an interpretation would be inconsistent with the constitutional principles of bicameralism and presentment.⁵⁰ We also noted that if Congress intended to dedicate such broad authority to the President, the power of the purse requires that it do so through an affirmative action in legislation, not through congressional silence.⁵¹

In June 2019, the Office of Management and Budget (OMB) amended its Circular No. A-11 addressing agency reports of Antideficiency Act violations found by GAO. The June 2019 revision instructs agencies to report such violations only if "the agency, in consultation with OMB, agrees that a violation has occurred."⁵² This revision was a departure from longstanding instructions to agencies. OMB had long instructed each executive branch agency to submit such a report whenever GAO found an Antideficiency Act violation.⁵³ Since 2004, when Congress amended the Antideficiency Act, GAO's practice has been that if GAO concludes that an agency has violated the Antideficiency Act and the agency does not make its required report, we notify Congress of the violation.⁵⁴ Reports of Antideficiency Act violations provide Congress with important information in its oversight of executive spending activity and underscore respect for Congress's constitutional power of the purse.

In response to OMB's June 2019 revision to Circular No. A-11, I transmitted a letter to agency general counsels explaining that GAO will continue to notify Congress of an agency's Antideficiency Act violation if the agency does not do so, noting the agency's failure to report.⁵⁵ The letter also noted that if GAO publishes a decision concluding that an Antideficiency Act violation occurred, we will contact the relevant agency to ensure a report of the violation, and if the agency does not report within a reasonable period, GAO will notify Congress of the violation.⁵⁶ While a GAO notification puts the violation

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 4, § 145.8 (June 28, 2019).

⁵³ See, e.g., GAO, *Anti-Deficiency Act: Agriculture's Food and Nutrition Service Violates the Anti-Deficiency Act*, GAO/AFMD-87-20 (Washington, D.C.: Mar. 17, 1987) (citing OMB Cir. No. A-34, *Instructions on Budget Execution* (1987)); OMB Cir. No. A-11, pt. 4, § 145.8 (June 2018); OMB Cir. No. A-11, pt. 4, § 145.8 (July 2007) (revised Nov. 20, 2007); OMB Cir. No. A-34, *Instructions on Budget Execution*, pt. 2, § 22.8 (Nov. 7, 1997).

⁵⁴ See, e.g., B-308715, Nov. 13, 2007.

⁵⁵ B-331295, Sept. 23, 2019.

⁵⁶ *Id.*

before Congress, our reports, of course, would only include information in the record associated with a decision; they would not include other information Congress may find useful, like agency activity to prevent recurrence of the violation or administrative discipline imposed upon agency officials responsible for the violation.

Legislative Proposals to Protect Congress's Power of the Purse

Congress has vested GAO with an important role to investigate and provide legal analysis on the use of public money. GAO takes this role seriously, and through our appropriations law work, we assist congressional oversight and serve Congress's constitutional power of the purse. To make sure that GAO is able to continue to advance and protect Congress's constitutional prerogatives, I would like to discuss some ideas that we have for legislative proposals that would help GAO carry out our work.

When GAO issues an appropriations law decision, we send a letter to solicit the agency's views of the facts and the law related to the decision. Recently, we have had difficulty getting timely responses from agencies, and, in some cases, we have not received responses at all. The delay in receiving these responses impedes our ability to issue decisions on a timely basis. To ensure that GAO receives timely responses to these letters, I might recommend a provision of law to require agencies to respond to our letters within a certain time period. I might also recommend that you consider imposing penalties or a reporting requirement on agencies that fail to respond to GAO.

Additionally, I would suggest that Congress consider some amendments to the Antideficiency Act. In its current form, the Act requires agencies to notify Congress when agencies identify violations, but is silent on what agencies should do when GAO finds a violation.⁵⁷ The June 2019 revisions to OMB Circular A-11 suggest that agencies may rely on this statutory silence to avoid reporting Antideficiency Act violations to Congress when GAO identifies a violation. Not only does this withhold important information from congressional oversight, it reflects diminished respect for Congress's constitutional power of the purse. I would recommend revising the Antideficiency Act to clearly require agencies to report when GAO finds a violation.

In 2007, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum concluding that a violation of a spending restriction that Congress enacted in a permanent statute does not violate the Antideficiency Act because the prohibition is not "in an appropriation."⁵⁸ This conclusion results in a rather anomalous policy that turns solely on Congress's choice of a legislative vehicle—permanent law or appropriations act—asserting, in effect, that Congress need not know of violations of

⁵⁷ 31 U.S.C. §§ 1351, 1517(b).

⁵⁸ Memorandum Opinion for the General Counsel, Environmental Protection Agency, *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, OLC Opinion, Apr. 5, 2007, at 1.

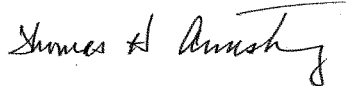
statutory restrictions, only appropriations act restrictions. This is not GAO's view.⁵⁹ As a result of OLC's conclusions, executive branch agencies do not report violations of funding restrictions that are not in an appropriation even though GAO would conclude those violations are also Antideficiency Act violations. I might offer that Congress could fix this underreporting of these violations by revising the Antideficiency Act, or enacting a permanent statute, to clarify that violations of funding restrictions—whether they are in an appropriation or not—are violations of the Act.

It has long been understood that the threat of criminal and civil penalties serves as an important deterrent for government officials and employees even though the Department of Justice has never brought charges against a government official or employee for a criminal violation of the Antideficiency Act. Lest the lack of prosecutions under the Antideficiency Act mitigate the deterrent effect, I might recommend requiring the Department of Justice to annually review reports in GAO's repository and issue a report to Congress, with a copy to GAO, on whether criminal charges should be brought for each Antideficiency Act violation reported to Congress.

Each of these legislative proposals would strengthen GAO's existing role to provide information and legal analysis to Congress regarding the spending of public money. But, more importantly, these proposals would also support and advance Congress's constitutional prerogatives.

Conclusion

Chairman Yarmuth, Ranking Member Womack, and members of the Committee, this completes my prepared statement. I would be pleased to respond to any questions that you may have.



Thomas H. Armstrong
General Counsel

⁵⁹ B-317450, Mar. 23, 2009; B-300826, Mar. 3, 2005.

Chairman YARMUTH. Thank you for your testimony.
Dr. Joyce, you are recognized for five minutes.

**STATEMENT OF PHILIP G. JOYCE, PROFESSOR OF PUBLIC
POLICY AND SENIOR ASSOCIATE DEAN, UNIVERSITY OF
MARYLAND, SCHOOL OF PUBLIC POLICY**

Dr. JOYCE. Thank you very much, Chairman Yarmuth, Ranking Member Womack, Members of the Budget Committee. I appreciate you inviting me to share my views on the role of Congress in the budget process.

I believe a strong congressional budget presence is crucial to the health of our democracy, and that ineffective congressional budgeting invariably strengthens the executive and weakens the Congress.

In my testimony, I am going to discuss how we got to this place, in addition to articulating some steps that are talked about in more detail in my written testimony that might be taken to shift the balance of power to a place where the Congress can be on a more consistently equal footing with the executive.

I would start by saying that I testified before this Committee in May 2016 in a very similar hearing. And I tried to avoid quoting myself, but I am going to. I read in that testimony a sentence that said, "It might be particularly fruitful to talk about this now since we do not know which party will occupy the White House in January 2017."

And all I had to do was change the date to 2021. But I think the sentiment still applies, which is that you may be able to think about the protection of congressional prerogatives as I think you should, relatively unconstrained by knowledge of who would control the presidency and the Congress.

It is important, I think, to start by reiterating the reason that the 1974 Act gave us budget committees, and the budget resolution, and CBO. And it is because they were viewed as essential to the Congress reclaiming the power that had shifted too much to the president.

And some parts of the law have worked well. I think CBO has given the Congress the analytical power to challenge the executive, and reconciliation has proved a very useful tool for the Congress to cut the deficit when it wants to.

However, the budget resolution itself has only been passed about half the time in the last two decades after being passed every year for the first two decades after the 1974 Budget Act. This suggests the possibility that the problem is not at least wholly procedural.

In fact, in 2011 I testified before this Committee with its former chairman, Jim Nussle, and he suggested to the Committee that, "Before you search for new budget procedures to fix the current process, actually give the current process a try."

I agree, and I think that the Congress basically had it right in 1974 when it created these committees, and CBO, and the budget resolution. In my testimony, I do suggest several changes in either law or practice that could assist the Congress in reasserting its congressional—or its constitutional role in budgeting.

First, I would change the Budget Committees into committees on national priorities to include the Chairs and Ranking Members of

the appropriations, tax writing committees, and also other major authorizing committees. I think this would lead to the budget resolution being taken more seriously.

Second, I would make the resolution itself stronger by thinking more comprehensively about how all the resources devoted to particular policy aims would be used, and how they are traded off against each other, rather than focusing on distinctions which are largely driven by committee jurisdiction between discretionary spending, mandatory spending, and tax expenditures.

Third, I do think it is important for the Congress to articulate a path for the budget on a routine basis. This does not necessarily mean passing a budget resolution every year. I am sort of agnostic about biennial budget resolutions versus annual budget resolutions. But as a matter of routine, I think having to confront the future path of the budget and deciding whether to use the tools available to you, primarily reconciliation, is a very important thing to do.

Fourth, I think the abysmal record of the Congress on appropriations contributes to the general loss of public regard for the Congress. This puts you in a weakened position relative to the president, and is a completely self-inflicted wound given that in only three of the last 44 years, have all the appropriations been passed and signed into law before the beginning of the fiscal year.

Fifth, I think Congress should take its oversight role seriously by attempting to figure out how well programs and policies are working, and how they might be changed in order to be more effective.

Sixth, I think that Congress should support and defend the analytical institutions, especially CBO and GAO, that assist it in performing its constitutional responsibilities.

And finally, I think that Congress should stand up for itself in the appropriations process by asserting its prerogatives to decide on the details of spending, ensuring in particular, that the provisions of the Impoundment Control Act are followed.

In conclusion, Article I of the Constitution comes first for a reason, and the Congress is called the first branch because of the desire of the founders; the policies and laws being initiated by the representatives of the People.

The budget process is the central means of deciding who will pay for government and what government will do. Power abhors a vacuum, however, and if the Congress does not reassert its authority through law and action, it will inevitably lead to the further transfer of power to the executive.

Thank you very much.

[The prepared statement of Philip G. Joyce follows:]



Testimony of Philip G. Joyce

Professor of Public Policy and Senior Associate Dean

University of Maryland, School of Public Policy

Before the Committee on the Budget

House of Representatives

on

“Protecting Congress' Power of the Purse and the Rule of Law”

March 11, 2020

Chairman Yarmuth, Ranking Member Womack, and members of the Budget Committee, thank you for inviting me to share my views on the role of the Congress in the budget process. I applaud the committee for focusing on this topic, as I believe that a strong Congressional budget presence is crucial to the health of our democracy. In my own view, the failure of the Congress to make effective use of its budgeting power, in addition to some institutional limitations that have been present since the passage of the Budget Act 45 years ago, have compromised the ability of the Congress to act as an effective check on the executive and as an alternate voice to the President in budgetary matters.

Recent Congressional budgeting failures have had the practical yet unintended effect of shifting power to the President, and that it is a good time to think about reclaiming some of that power. It might be particularly fruitful to talk about this now, since we don't know which party will occupy the White House in January of 2021. Regardless of who the President might be, it is appropriate for the Congress to consider whether it wants to reassert Congressional prerogatives, particularly with respect to the budget.

In my testimony, I will discuss some of the historical developments that have brought us to this place, in addition to articulating some of the steps that might be taken to shift the balance of power to a place where the Congress can be on consistently equal footing with the executive.

What Did the 1974 Budget Act Do?

I will spare you a long budgeting history lesson, although I would direct those who want more history to the best book ever written on Congressional budgeting, Allen Schick's 1980 classic Congress and Money.¹ In that book, Professor Schick outlines the events and debates that led up to the enactment of the Congressional Budget and Impoundment Control Act, and discusses its early implementation. I will not, and could not, repeat that analysis, but I would like to remind

¹ Allen Schick, *Congress and Money* (Washington: Urban Institute Press, 1980).

you of why the Congress decided to pass the 1974 Act, and suggest both its successes and limitations with respect to the relative budgetary power of Congress and the executive branch.

The 1974 Budget Act was born entirely out of a concern that too much budgetary power had accrued to the executive branch, particularly in the wake of the use of impoundment power by Presidents (particularly President Nixon), leading to their failure to faithfully execute the laws. Rather than consider legislation that focused only on constraining impoundments, the committees that drafted the 1974 Budget Act focused more comprehensively on reasserting Congressional budgetary prerogatives, through the following additional actions:

- The creation of a budget resolution, as an opportunity—indeed, the ONLY opportunity—for the Congress to focus comprehensively on the budget, and therefore come up with an alternative fiscal policy—and fiscal path—to that laid out by the President in his proposed budget. The reconciliation procedure, which would promote legislative changes in response to the constraints of the budget resolution, was a specific element of the budget resolution. The budget resolution augmented the wholly decentralized approach that had existed prior to that point, in which individual committees considered pieces of the budget, but the Congress never considered the budget as a unified whole.
- The establishment of Budget Committees in both the House and Senate to provide the Congress with an institutional capacity to compose and enforce the budget resolution.
- Setting up the Congressional Budget Office (CBO) as an explicit source of nonpartisan economic and budgetary information for the Congress as a counter to the budget and economic information coming from the executive branch.

These reforms have had a somewhat checkered history. CBO is generally viewed as a highly credible source of information that has promoted the independence of the Congress, not only in budgeting, but in other policymaking as well.² The budget resolution has sometimes been highly successful, especially in years in which reconciliation has been used, in assisting the Congress in

² As someone who has written an entire book on CBO, I will resist the urge to go further, but refer you to the book—*The Congressional Budget Office: Honest Numbers, Power and Policymaking* (Georgetown University Press, 2011). One of its main themes has to do with how CBO has enhanced the capacity of the Congress to challenge Presidential policy initiatives.

making changes in budget policy. In the 1990s, it was reconciliation that promoted the legislative changes that moved the budget from deficit to surplus. Even in years where reconciliation was not used, the budget resolution afforded the Congress an opportunity to articulate a different fiscal path than that pursued by the President. This certainly was true in the early years of the Obama administration, when attention was focused on the contrasts between the President's budget and (in particular) the House budget resolution.

On the other hand, recently the budget resolution has become a somewhat "hit and miss" proposition, mostly because of the failure of the House and Senate to agree on a fiscal blueprint. In fact, while the Congress agreed on a budget resolution for every fiscal year from fiscal year 1976 through fiscal year 1998, for 11 of the 22 fiscal years between 1999 and 2020 there was no budget resolution, including five consecutive years between fiscal year 2011 and fiscal year 2015. I would note, as an additional historical footnote, that while House budget resolutions have sometimes been late, the House has typically passed a budget resolution, while the Senate often (at least recently) has not.

It is this kind of episodic budget-making that led former House Budget Committee Chair Jim Nussle, when testifying before this committee in 2011, to make the following statement, responding to the general notion that the budget process is "broken". Chairman Nussle believed that most of the necessary tools that the Congress needed already existed:³

Before you search for new budget procedures to "fix" the current process, actually give the current process a try. Prove that Congress and the president can follow the current process and rules before you decide that a new process or rule will somehow do the trick. Most of you have yet to see the current process work because most have not even seen it fully attempted or implemented!

I fundamentally agree with Chairman Nussle's main point. I believe that the Congress had it basically right in 1974 when it created these committees, CBO and the budget resolution. These institutions and devices, when used effectively, can enable the Congress to articulate a credible

³ Statement of the Honorable Jim Nussle before the House Committee on the Budget, September 22, 2011.

alternative path for the budget. I do not think we need to blow up the process and start from scratch. There are, as I will suggest below, some changes in either law or practice that could assist the Congress in reasserting its constitutional role in budgeting—some of these are more fundamental and some are smaller. But all take as a given that the Congress must have an ability to consider and articulate an overall fiscal plan, and that the kind of piecemeal approach to budgeting that characterized the process prior to 1974 is inconsistent with an appropriate constitutional role for the Congress.

What Kinds of Changes Might Assist in Reaffirming the Congressional Role?

So if I would not build a new budget process from the ground up, what are changes that the Congress should consider in order to make sure that its role is as strong as was anticipated when the new budget process was created in 1974?

1. Rename the Budget Committees and Strengthen These New Committees

The Budget Committees, in a sense, were made institutionally weak in the 1974 Act. The committees that wrote the law had substantial representation from the other House and Senate “money” committees (in particular the tax writing and appropriations committees). These existing committees were concerned that the Budget Committees not become too strong, lest they upset the prior power structure. The fact that the budget resolution did not have the force of law, for example, made it a lesser form of Congressional action than the bills that were passed by authorizing and appropriations committees. Further, the budget “functions” that were at the center of the budget resolution neither related to the committee structure of the Congress nor the organization of the executive branch. More recently, since the budget resolution is important only episodically, members of Congress have also over time had less interest in serving on the Budget Committees. These committees are now more likely to be populated by more junior members.

In 1987, and again in 1993, Senator Nancy Landon Kassebaum (R-KS) introduced a resolution that would have created leadership committees in the Senate to replace the budget committees. The Kassebaum proposal would have created a Senate Committee on National Priorities, with responsibility for drafting the annual budget resolution, which would then still need to be passed

by the whole Senate. Kassebaum proposed that this committee consist of the chairs and ranking members of all Senate committees, except that the majority leader of the Senate would have had the authority to appoint up to five additional senators to serve on this committee in order to make its membership mirror the relative balance between the majority and minority parties in the Senate.

I think that Senator Kassebaum's idea has a lot of merit, and I would argue for the creation (in each house) of Committees on National Priorities, that would have responsibility for the development and enforcement of the annual budget resolution. These committees would include the chairs and ranking members of the appropriations and tax-writing committees in each respective house, in addition to representatives of the congressional leadership from each party, and the chairs and ranking members of other major authorizing committees (meaning those with jurisdiction over major areas of spending, such as defense, banking or health). There would be some accommodation, as in the Kassebaum proposal, for the balance of power in each House, so that the majority party would have more members than the minority party.

The notion here is that the function served currently by the Budget Committees would be taken more seriously if the committees responsible for the budget resolution were an explicit reflection of the Congressional leadership. This would both make it more likely that a budget resolution would be enacted and that its precepts would be taken seriously by other committees. Overall fiscal policy would then be made from a position of institutional strength, rather than institutional weakness. I do think that the move of the House to allow for longer service on the Budget Committees is a positive step in this direction, even though I might go further. I also would note that while I am explicitly not focusing on broader Congressional reform in this testimony, I believe that a comprehensive reform of the Congressional committee structure is also probably long overdue.

2. Strengthen the Budget Resolution

Beyond creating a higher profile for the committees themselves, I would recommend two actions to make the budget resolution itself stronger and more meaningful. First, I would use the budget resolution as an opportunity to think about how all resources intended to affect a particular policy area are deployed, and what the expected results of those activities are. This is consistent with

what Steve Redburn and Paul Posner have referred to as “portfolio budgeting”.⁴ Too often our budget process focuses on “programs” on a piecemeal basis rather than thinking about how those resources fit together to help achieve society goals. Instead, for example, of thinking about a comprehensive approach to health, or housing, or education, we are constrained by the distinction between discretionary spending, mandatory spending, and provisions of tax law. Under the portfolio approach, mandatory spending, discretionary appropriations, and tax expenditures would all be explicitly captured in the budget resolution. In addition, the focus should be on the expected performance of all policies within a given policy arena, not just on the resources that are consumed by them. This reform is included as part of the Enzi-Whitehouse budget reform proposal that was reported out of the Senate Budget Committee last year.

In addition, it would be useful if the budget resolution focused explicitly on allocations to Congressional committees, and scrapped the attention to budget functions, which do not map to anything meaningful. If the committee allocations were included in the budget resolution itself, it would be more transparent how the budget resolution related to later Congressional action. This change would also be consistent with the idea of having chairs and ranking members of major committees on the committees producing the budget resolution.

3. Pass a Budget Resolution Routinely

Right now, the episodic adoption of budget resolutions reinforces the notion that they are unimportant, or optional. The budget resolution is intended to be the place where the Congress articulates its vision for overall budget policy. In an annual budget process, if the President presents his vision annually, but the Congress only responds sometimes, this suggests that it is the President who should be focusing on the totals, and the Congress should simply be hammering out the details. I think the Congress has unintentionally encouraged this notion by behaving, in some years, as if the purpose of the budget resolution is simply to provide a 302(a) allocation for the appropriators.

⁴ F. Stevens Redburn and Paul Posner, “Budgeting for National Goals,” Working Paper #2 for the National Budgeting Roundtable (Centers on the Public Service, School of Policy, Government and International Affairs, George Mason University, August 2015).

Right now, as you know, the budget is now on an unsustainable path. The debt held by the public sits at almost 80 percent of GDP, and is projected by CBO to rise to more than 90 percent of GDP by 2030. This increases the urgency of the Congress to consider not leaving the budget on automatic pilot, but rather consciously focusing on what stance it wants to take in terms of overall fiscal policy. I am sympathetic to those, including advocates of biennial budgeting, who want a budget resolution every other year at the beginning of the Congress rather than annually. Regardless of whether it is adopted annually or biennially, a budget resolution is an important statement of congressional priorities, and routine adoption sends important signals. Routine passage of the budget resolution forces the Congress to confront the future path of the budget, and decide whether to use the tools available to it—especially reconciliation—to change that path.

4. Make the Budget Process More Predictable and Timely

The credibility of the Congress has been substantially damaged through its failure to follow deadlines. Part of this has to do with the hit-and-miss nature of the budget resolution, but the abysmal record of the Congress on appropriation bills is far more important, and damaging. As this committee knows, the appropriations process has been completed prior to the start of the fiscal year only 3 times in 44 years since the Budget Act became law. While this has only infrequently resulted in government shutdowns (including the longest ever shutdown of 35 days a little more than a year ago), there are insidious negative effects from late appropriations, which compromise both the efficiency of the federal government, and the effectiveness of programs.⁵

Further, the general loss of public regard for the Congress, reflected in low public approval ratings for the institution, put you in a weakened position relative to the President. This is a completely self-inflicted wound. I have no specific evidence concerning precisely how government shutdowns, “fiscal cliffs”, and late budgets has translated into a specific loss of public faith in the Congress. But it can’t have helped. If the Congress is viewed only as a source of gridlock, it not only invites unilateral executive action, but reinforces the notion that the President can get things done and the Congress cannot. I would therefore conclude that timely adherence to the budget

⁵ For more detail on the specific effects of late appropriations, see Philip Joyce, *The Costs of Budget Uncertainty: Analyzing the Impact of Late Appropriations* (Washington: IBM Center for the Business of Government, 2012).

timetable not only makes the government work better and cost less, it also strengthens the Congress as an institution.

5. Better Congressional Oversight

Budgeting, of course, is a process that occurs fundamentally before programs are being carried out, in an effort to determine the most appropriate allocation of scarce resources. After they receive funds, however, agencies have a great deal of discretion in terms of carrying out programs, making regulations, providing grants, and for generally executing programs and policies. Congressional oversight is important in terms of making sure that this discretion is being exercised in a way that is consistent with legislative intent. Therefore, Congressional committees need to make sure that they are devoting appropriate attention to oversight. Not all oversight is created equal. Simply hauling executive branch employees before Congressional committees to score political points may be good theater, but does not necessarily lead to more effective government. Instead, Congress should focus on the more difficult, but important, kind of oversight that attempts to figure out how will programs and policies are working, and how they might be changed in order to be more effective.

6. Respect and Support the Tools That You Have

The support agencies that the Congress has established—CBO, GAO, and CRS—are important tools that the Congress needs to exercise its constitutional power. CBO and GAO, in particular, have important roles to play in the budget process.

It is perfectly legitimate—and expected—that individual members of Congress and congressional committees will disagree periodically with these agencies. They will question the conclusions that GAO reaches as a result of its audits, studies, and decisions. They will disagree with CBO's cost estimates. They will call for more transparency concerning the way in which the work of these agencies is done, or how conclusions are reached. It is important, however, that the Congress understand that the credibility of these agencies is critical to the ability of the Congress to challenge the executive branch. There have been times, in the past few years, when individuals in the executive branch have questioned the need for—and the legitimacy of—one or more of these agencies. There have also been times when members of Congress have joined in these attacks. In

my view, the Congress should support these agencies, regardless of which party controls the legislative or executive branch. Failing to do so is a form of unilateral disarmament that damages Congress as an institution, and compromises its ability to exercise its appropriate constitutional role.

7. Standing up for itself in the Appropriations Process

Presidents frequently, in their budget proposals, suggest changes to which the Congress must respond. This is true without regard to the party of the President or the Congress. It is not surprising that there tends to be more agreement between the branches on the overall levels of spending for particular agencies when there is unified government. Even in those cases, however, the Congress frequently wants to assert control over the details of spending.

The Trump administration, in its first three budgets, proposed large reductions in many appropriated agencies and programs, for agencies such as the EPA, HUD, and the State Department. They have also proposed some substantial changes in some mandatory spending programs. The Congress, for the most part, has opposed large cuts in appropriated budgets, and has not enacted most of the changes in mandatory spending requested by the Administration.

It is important, however, that the Congress also defend its prerogatives to enforce the details. There are cases, of course, such as transfers and reprogrammings, where the executive branch has some leeway to make changes in how appropriated funds are used. In cases where the President wants to move money from one appropriated account to another, however, there are established procedures established under the Impoundment Control Act. First, the President was to request a “rescission” of budget authority from the account containing the funds that he wished not to spend. Second, he would request a new appropriation for the new account (or addition to an existing account) that he wanted to spend from. The Congress should protect its prerogatives by holding the chief executive accountable for following such a process.

Conclusion

Article I of the Constitution comes first for a reason, and Congress is called the “first branch” because of the desire of the founders that policies and laws be initiated by the representatives of the people. Nowhere is the focus on Congress more appropriate than in the budget process, which is THE central means of deciding who will pay for government, and what it will do. The 1974 Budget Act was fundamentally correct in asserting that the Congress must have the capacity both to set a path for fiscal policy, and to effectively challenge the President. The tools are there, at present, to do both of these things. There are tweaks, however, that would make the tools more potent, and the Congress must have a renewed commitment to fulfilling its constitutional role in an appropriate and timely way. Power abhors a vacuum, and if the Congress does not reassert this authority through law and action, it will inevitably lead to the further transfer of power to the executive branch.

Chairman YARMUTH. I thank the gentleman. We will now begin our question and answer session, and we are going to depart from our customary pattern, and I am going to recognize the Ranking Member, Mr. Womack, for 10 minutes.

Mr. WOMACK. I thank the Chairman for giving me this opportunity early in the hearing because I do have a couple of other hearings that I have to depart for. And I appreciate, again, the testimony, and quite frankly, the education that we have received from these experts that are seated before us.

Dr. Joyce, question for you. We all know that our democratic government is based on a system of checks and balances. And as I mentioned, in the hearing we had yesterday with the DoD Deputy Secretary Norquist, I have some serious concerns about the executive branch's recent decision to substitute its judgment on key defense funding decisions that were made by the Congress of the United States.

So regarding discretionary spending that is provided by Congress and the appropriations process, what are the checks and balances that we have over the executive branch to ensure the Administration implements the bills that are—that fund the government in accordance with the intent of Congress?

Dr. JOYCE. Well partly, I think what you have to do is think about exactly how much detail and direction you want to provide in law in those appropriation bills. I mean, often where the gray area comes in might be where there is guidance that is in report language, or guidance that is in, you know, something that is said on the floor but it is not necessarily in the bill itself.

So I think you, in some sense, have no choice in that kind of situation but to try to make the law more strict in terms of what you are permitting and not permitting to happen.

Mr. WOMACK. You have done extensive work in this area, and as you indicated in your opening, you testified before this Committee in 2016 about this broken budget process. With that said, it is extremely frustrating to me, and probably to you, that we have not been successful in fixing this process over time.

Dr. JOYCE. Right.

Mr. WOMACK. We gave it a good try in 2018 as was mentioned in my opening. The Chairman was with me. The guy that sits here, to my right, was with me during this process. We got very close to the finish line but fell just a little bit short. And now Congress continues to rely on a harmful practice such as CRs, omnibuses, and budget deers to fund the federal government.

So in your opinion, why have we failed? And let me just add this. When the vote was taken, the threshold was a super-majority. We had to have five, and five out of the sixteen-member Committee. Four Republicans each, Republican, Democratic House and Senate. Four of my Democrat colleagues voted present on the final vote.

Dr. JOYCE. Mm-hmm.

Mr. WOMACK. Why have we failed?

Dr. JOYCE. I think in part, I think it is always hard to change the status quo because the people who are present at any given point in time might feel like they are getting some benefit from the status quo. I think also, you know, there is a serious question in my mind, you know, given the overall fiscal situation we are in.

How much budget process changes themselves can help us get out of the, you know, \$23 trillion worth of debt.

The Congress does not tend to—the budget process is not good at forcing the Congress to do things that it does not want to do. And I think the places where the budget process could be changed, and where I think some of the sort of fruitful kinds of process changes that you would consider, are places where it would give the Congress more information and it would help the Congress to better stay on its—on the schedule that it has established for itself.

I think people confuse having the budget process get us out of the fiscal mess with having the budget process sort of helping the Congress to be able to have a more effective means of making those decisions. And maybe it is difficult for people to sort of separate those, too.

I thought that you—your committee did a very good job of doing that, actually, of keeping the procedural fixes where they ought to be. I do think that the, you know, in that particular case, the rules that were set up in advance, which I understand why they were, but they required such a, you know, a super-majority that it—the hurdle was very high in getting something out of that committee.

Mr. WOMACK. That may have been intentional on their part.

Dr. JOYCE. Right.

Mr. WOMACK. I do not know, but we got very close.

Professor, I have a quick question for you. It, in my opinion—and thank you for the history lesson, that was very instructive to me and I need to read more of that.

But to me, it is grossly antithetical for instead of doing a budget resolution and doing what we call—all of us call regular order, that we would kick the decision to four people basically, the leaders of the House and the Senate, to basically decide what those numbers that our appropriators are going to write to and have nothing to do, by the way, with mandatory spending.

That's a whole other subject, but for the—for four people to have to come to some agreement on what the appropriators 302(a)'s should look like. Do you agree with that?

Mr. CHAFETZ. I do agree with that. One of the things that the rise of continuing resolutions and omnibus bills certainly does is shift control from committees generally, and especially this Committee, to leadership.

And, you know, you asked Dr. Joyce why previous efforts had failed. I would point you there, right, leadership has—you know, cameral leadership has relatively little incentive to try to decentralize power to committees when it can sort of maintain that power in itself.

And so you have a situation where leadership of both parties is much more invested in something like the continuing resolution omnibus way of going about things than in the regular order.

Mr. WOMACK. Any of you that followed the Joint Select Committee knows that we struggled. They had a lot of discussion about, and struggled with, the old carrots and sticks idea. Personally, I think that there have to be some consequences for the failure to do your job.

In the private sector, failing to do your job means you probably don't have a job. But up here it is a little bit different. You talked

in your recap of history that there were consequences where there was the withholding of either rent or pay or something. Some benefit that would accrue to the people that are violating the terms.

Is it going to be necessary for us to have some serious consequences ultimately for the Congress not to do its job?

Mr. CHAFETZ. I think it is important for this Committee to sort of decide how much of that power it really wants to wield, and how much it wants to cede to leadership. There are the consequences for, sort of the Congress as an institution, right, in terms of the sacrifice of its power to the executive.

I think equally there should be consequences for the executive. You know, a lot of what I talked about in the sort of historical recap was situations in which the executive branch tried to seize appropriations power, or tried to wield appropriations power on its own without the legislature, and the ways that various legislatures have pushed back on that. And I think Professor Pasachoff pointed us to a lot of ways that is happening today as well.

So in thinking about what there should be consequences for, I would point first to consequences for sort of an executive branch usurpation. And maybe one way that Congress can go about implementing those consequences is through revamping its own procedures, and perhaps one of those would be a return to regular order.

Mr. WOMACK. I thank the panel for your testimony here today. I wish I could sit through all of it. I will get a report back for what else transpires here today.

And again, Mr. Chairman, I want to thank you for your hard work on the Joint Select Committee. I thought we did really, really good stuff and maybe have a blueprint for how things can go forward.

But this is, in my serious opinion, one of the most pressing issues facing the Congress of the United States. And that is to get back to some regular order on budgets and appropriations. Because while there may not be consequences for us failing to do our jobs, there are consequences for this country eventually, and that is yet to be determined.

And I yield back.

Chairman YARMUTH. The gentleman yields back. I now recognize the Vice Chairman of the Committee, the gentleman from Massachusetts, Mr. Moulton, for five minutes.

Mr. MOULTON. Thank you, Mr. Chairman. And as the Vice Chairman of the Committee, which sounds like a much bigger deal than it actually is, I would like to thank both the Ranking Member and the Chairman for their work on that Joint Select Committee. And I do wish they had been successful, and it is an effort that we should try to do again.

Thank you all for joining us here today. You know, I think you may not realize it, but you are actually very fortunate to be here today in the hotseats because I cannot remember a time when there has been more bipartisan consensus on this Committee and bipartisan concern.

And you know, I think that we would be a better Congress if that happened more often. Because in the midst of a very difficult divisive time in politics here in Washington, we cannot forget why we are here and the solemn oath that each of us swore not to the

Speaker of the House or the President of the United States, not to this party or that party, but to the Constitution. To the Constitution that we all hold dear.

We do not spend enough time thinking about that oath and understanding the Constitution and the laws; those wise restraints that make us free that support it. Certainly, one issue of bipartisan concern here is the diminishing role of Congress and our diminishing willingness to exercise our authority when it comes to oversight of the executive.

At the beginning of the year, the Government Accountability Office determined that the Administration violated the law when it withheld military assistance from Ukraine.

Mr. Armstrong, I have a feeling you played a role in making that determination. Can you share briefly how you came to that conclusion?

Mr. ARMSTRONG. You know, Mr. Moulton, that was really a fairly straightforward legal analysis. The Impoundment Control Act is the only authority that a president has to withhold funds from obligation. The president doesn't have any constitutional authority to withhold; doesn't have any inherent authority to withhold. And the Impoundment Control Act permits a withholding for policy reasons only if the president submits a rescission proposal and waits 45 days. And if Congress does not act to rescind during that 45-day period, the president must release the money.

What we found was that this Administration withheld funds from obligation for almost two months. And when we asked the Office of Management and Budget the reason for it, OMB told us that it was to ensure the money was going to be spent consistent with the President's policy considerations.

There is no authority in the Impoundment Control Act to withhold for policy reasons; it is really clear. And so there was not—that was not that difficult a legal decision to come to. The difficulty we had in the time we had, was developing the information we needed to establish the facts, and to analyze those facts because we apply the law to facts, and we go where the law takes us.

Mr. MOULTON. So I mean, hearing that a president might withhold money for policy reasons, I imagine sounds to many like a reasonable thing to do; it doesn't seem totally out of the ordinary. But the problem is that, as you say, it is against the law.

Mr. ARMSTRONG. Yes.

Mr. MOULTON. Is that safe to say?

Mr. ARMSTRONG. Yes, that is right. Yes.

Mr. MOULTON. And is there anyone on the panel who would disagree with that?

[No verbal responses.]

Professor Chafetz, you are the constitutional historian, or at least one of them here today. What might have concerned the anti-Federalists like Jefferson and Madison about power shifting more and more to the executive under modern presidents, both Democrat and Republican? And in this particular example, how would their interpretation of the necessary and proper clause of the Constitution inform these concerns?

Mr. CHAFETZ. Well just to be clear, when we are talking about the antiFederalists, we are talking sort of earlier—a little bit ear-

lier time period. We are talking about the people that actually opposed ratification of the Constitution, so people like Patrick Henry and Luther Martin. And their main concern when they looked at the structure of the presidency was that it looked a lot like the British Crown. You know, you have got this person, and admittedly, elected only for a term of years. But who has control over the military? Who has a role in the legislative process with the veto?

They were concerned about a sort of overbearing presidency. And the response they kept getting from people like Madison and Hamilton was you do not need to worry as much about the president because Congress will always have the power of the purse.

And in particular, there is a provision in Article I that says no appropriations for the Army can last for more than two years. They said, "Look. Every new Congress will have the opportunity to defund the military if we see the president using it in an oppressive way."

So the idea that the power of the purse was the central reason that you could trust the new Constitution against this fear that the president would become a monarch; that was the sort of big concern there.

Mr. MOULTON. Thank you very much.

Thank you, Mr. Chairman.

Chairman YARMUTH. The gentleman's time has expired. I now recognize the gentleman from Ohio, Mr. Johnson, for five minutes.

Mr. JOHNSON. Well thank you, Mr. Chairman.

I would like to echo what the Ranking Member said earlier. Your work on that—the bicameral budget reform group, I wish we had actually produced some things. I have tremendous respect for you and the work that you do, but I am a little bit confused, you know, because today this hearing is called, "Protecting Congress' Power of the Purse and the Rule of Law." But I wish instead it was titled, "Exercising Congress' Power of the Purse and Complying with the Law" because we are doing neither.

We are not here to mark up a budget because, Mr. Chairman, you have not been able to bring your colleagues around to produce a budget. In fact, this is the second year in a row; and I might remind that the last time that my colleagues had control of the House for four years they did not do a budget. There is just a—there is a philosophy on that side of the aisle that says budgeting is not important.

It is the chief responsibility of this Committee to write a budget resolution. Instead, over the last year we have convened hearings to talk about things like Medicare for All, the Green New Deal, and the need for comprehensive immigration reform. But we have not come together to do what we are sent here to do: to pass a budget. To put it simply, we have not done what the American people sent us here to do and what the law requires us to do.

The failure of this Committee to write a budget resolution is a failure of our constitutional duty. In other countries, the refusal or inability to pass a budget leads to motions of no confidence, resignations of prime ministers, and snap elections. But not here, not in Congress. Thank God it does not work that way, or we would all be out on our ears.

My colleagues are well aware that there are no consequences for inaction, even though the Budget Act establishes the various steps and deadlines of the congressional budget process. Instead, Congress relies on continuing resolutions and omnibus appropriations to fund our federal government.

Just yesterday, the Deputy Secretary of Defense testified before this Committee and gave many examples of how CRs create uncertainty for our men and women in uniform and weaken our military readiness. And yet, Congress will likely rely on another CR this year.

I would like one good reason why we should rely on CRs and why we are not passing a budget. I have asked that question but not—I have not gotten an answer. You cannot. You cannot reconcile that because there is no good reason why Congress is failing to pass a budget.

I respectfully remind my colleagues, my Democrat colleagues, about failing to write a budget resolution for Fiscal Year 2020. They have essentially violated the Budget Control Act—the Budget Act.

And so if this Committee wants to have a meaningful discussion on Congress' power of the purse and the rule of law, then we should start by following the law. Produce a budget. Let's have a markup. Or at the very least, let's convene a hearing to discuss the need for bipartisan, bicameral budget process reform.

This is the House Budget Committee, so let's do what the law requires us to do and what the American people expect us to do. OK.

Dr. JOYCE, the last time Congress successfully observed the process, adopted a budget resolution, and conference report followed by separate appropriations bills before the beginning of the subsequent fiscal year, was in 1995. How effective do you think the Budget Act has been in enhancing Congress' control over the budget?

Dr. JOYCE. I think in practice it has not been very effective; it certainly has not been very effective since that point. When it was most effective was, I would say, in the first half of the 1990's when reconciliation was used to actually try to get a handle on the large fiscal problems that were facing the country. But without using those tools, I think the Budget Act cannot be very effective.

Mr. JOHNSON. Do you have any thoughts about how Congress can improve the current congressional budget process?

Dr. JOYCE. I think most of the issues around the failure of congressional budgeting do not have to do with the process. They have to do—

Mr. JOHNSON. It has to do with complying with the process.

Dr. JOYCE. They have to do with the operation of the process, not what the process says in law.

Mr. JOHNSON. OK. What elements of the Budget Act do you believe should be retained as we move through potential budget process reform?

Dr. JOYCE. Well I mean, I do think that the role of CBO is very important. I think CBO has empowered the Congress in a way that it was not empowered prior to that point, and I think the budget resolution when used, and reconciliation, are powerful tools.

As I suggested in my testimony, you know, I would actually strengthen both the budget resolution and the Budget Committees.

Mr. JOHNSON. OK. Well I thank you.

And Mr. Chairman, I yield back.

Chairman YARMUTH. Yes. The gentleman's time has expired. Now I recognize the gentlewoman from Illinois, Ms. Schakowsky, for five minutes.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

Mr. Armstrong, just let me say this. I am in my 22d year in Congress and have relied heavily on the GAO all that time in getting the kind of nonpartisan, and accurate, and helpful information in so many different ways. And I just want to put that on the record, how much it is appreciated.

Mr. ARMSTRONG. Thank you, ma'am. I will pass that on to the Comptroller General.

Ms. SCHAKOWSKY. Thank you.

Mr. ARMSTRONG. Thank you.

Ms. SCHAKOWSKY. And I know that even the Supreme Court and other federal courts have cited decisions of the GAO. I wonder, you refer to some, but I wonder if you could summarize the ways in which Congress might help or that we may even pass some laws that would make your work more effective?

I know that you cited a couple of things, but if you could give us the guidance right now in summary, I would really appreciate that.

Mr. ARMSTRONG. Yes. We have a pretty long wish list, so to speak, that we can sit down with staff and walk through that. Among the things that I consider to be higher priority would be ensuring legislatively no impoundments during the final 45 days of a fiscal year. Requiring that agencies report Antideficiency Act violations, even if they disagree with GAO's findings. Making clear that a violation of a spending restriction enacted in permanent law, rather than an Appropriations Act, does need to be reported to Congress. And something that may be seemingly mundane as requiring agents to—the agencies to be responsive to GAO.

Ms. SCHAKOWSKY. Mm-hmm.

Mr. ARMSTRONG. You know, as part of our regular process, when we open up a case, one of the first things we do is we send a letter to the general counsel or the agency whose appropriation has been questioned. And sometimes it takes months to get responses to those letters.

A fairly notorious case was last year in September we issued a decision on Department of Interior activities during the fiscal 2019 lapse in appropriations. We ended up issuing the decision without a response from Interior. We sent a letter to the solicitor of the department and three months later, they still had not replied. Curiously, the day after we issued the decision, we got their reply.

Ms. SCHAKOWSKY. Mm-hmm.

Mr. ARMSTRONG. And we issued the decision anyway because we were confident with the information we had been able to develop publicly, and information that we were able to develop from members' offices, too, the correspondence that Interior had with Members.

Ms. SCHAKOWSKY. Ostensibly, are they required to answer in a timely way or is there just this lack of assistance?

Mr. ARMSTRONG. There is no legislation that requires it, but there has been a long-standing practice. I will tell you, I have been at GAO doing this work for 42 years and we have never had the problem to this extent. And there are times when an agency will come back to us and say, "We need a little bit more time." And we understand that, and we are willing to work with that, so long as they eventually do respond to us.

Now that is something that seems rather mundane, but remember, our role is to provide you the information, legal views, and legal conclusions that you need to exercise your oversight of executive spending activity.

Ms. SCHAKOWSKY. Has that ever prevented you from making a decision because there has not been a response?

Mr. ARMSTRONG. No. But it has seriously delayed the issuing of decisions.

Ms. SCHAKOWSKY. Sure.

Mr. ARMSTRONG. Because when we do not get a response, we try other ways to get the information we need. What we do not have, when an agency refuses to respond, is we do not have that agency's legal views. And we want to be fair. We are nonpartisan, so I want to know what the other agency thinks. I want to know what their lawyers—how their lawyers defend and explain their actions. That informs our decision.

Ms. SCHAKOWSKY. Of course.

Mr. ARMSTRONG. And without a reply from, in this case, the solicitor, we are not so informed. I will tell you that when we did get that reply the day after we issued the decision, there was nothing in the decision that would have changed our conclusion.

Ms. SCHAKOWSKY. OK. My time has just expired.

Mr. ARMSTRONG. Oh, I am sorry. Yes.

Ms. SCHAKOWSKY. But I appreciate the answer and hope in a bipartisan way we can work with you to make those improvements in the law. Thank you.

I yield back.

Mr. ARMSTRONG. Yes. Well I am willing to talk more about it.

Ms. SCHAKOWSKY. OK.

Chairman YARMUTH. That is good. The gentlewoman's time has just expired. And now I recognize the gentleman from Texas, Mr. Flores, for five minutes.

Mr. FLORES. Thank you, Mr. Chairman.



I would also like to thank the panel for joining us today. I think this has been helpful. I could belabor the point about the fact that this Committee has not passed a budget, but I think that has been done adequately so far.

One of the areas where the federal budget struggles is because Congress continues to appropriate money for programs where the authorization has lapsed. And based on the latest numbers I have seen, it is about \$300 plus billion a year which, any way you put it, is 30 percent of the trillion dollar deficit. So that would be one easy way for Congress to address a substantial part of the deficit.

So there are tools that have been talked about to deal with this issue and I would like to bounce that off of you moving forward.

I am going to direct my questions to Mr. Armstrong and to Dr. Joyce.

Do you agree that the amount of money we spend on unauthorized programs is a problem, Mr. Armstrong?

 Mr. ARMSTRONG. You know, the lack of an authorization removes the oversight committees from the process. And I will say that when Congress enacts an appropriation and there is no authorization, the appropriation does stand as the authorization. So the failure of an authorization is the failure to get the input of the oversight committees. 

Mr. FLORES. Correct.

Mr. ARMSTRONG. Now that is Congress' choice. You know, a GAO does not have a position on that. As a lawyer, I can tell you that when Congress enacts an appropriation, the president, under the Constitution, is supposed to execute that law. And executing an appropriations act is obligating and spending the money, so it does not legally need an authorization.

Mr. FLORES. But it is still Congress abdicating its responsibility for oversight.

Mr. ARMSTRONG. Yes, it removes the Oversight Committee's fundamental process.

Mr. FLORES. Dr. Joyce.

Dr. JOYCE. Well unconstrained by having to be nonpartisan, I will say, I do have an opinion, which is that, you know, I think this is a problem and it is a longstanding problem.

I worked at CBO from 1991 to 1996. CBO is required every year to do a report on expiring authorizations and unauthorized appropriations. And as I recall, the number on the domestic discretionary side, the percentage has been consistently about 40 percent, you know, almost forever.

And I agree entirely that what that means is the Congress is failing to exercise effective oversight. That is one of the things I talked about in my testimony. When I say "effective oversight" I mean trying to actually figure out whether programs are working or not.

Mr. FLORES. Right.

Dr. JOYCE. I do not mean just hauling somebody before a committee because, you know, a story appeared on the front page of the Washington Post.

Mr. FLORES. Right. Now there is a set of tools that have been introduced that would deal with this issue, so I would like to get the feedback of each of you. And let me run through the tools, first, and then get your feedback.

The first tool would be mandatory sequesters on sunsets for unauthorized programs. Specifically, you had initially put the unauthorized programs on a pathway to sunset in three years, which would be enforced by reduction of the overall budget authority based on the total value of the unauthorized programs.

The second would be to establish a commission that would have three tools in its portfolio. One is to establish a full authorization schedule of all discretionary programs at agencies for Congress to use as tool to keep track of these.

Second, is to conduct a review of all mandatory spending programs with a view toward the third item, and that is to the—in

the event there is an unexpired program that is reauthorized by Congress, and the commission would identify the resources to restore the funding by identifying custom mandatory programs to use as budget offsets for that restored funding.

So Dr. Joyce, what do you think about those particular tools to address this issue?

Dr. JOYCE. Well I mean, I have not thought about sequestration of mandatory spending. I think the idea has merit with respect to discretionary spending.

Mr. FLORES. Well this would be for the—on the discretionary side.

Dr. JOYCE. Oh, that is right. Yes, on the discretionary side, then I think, you know, anything that you could do that would turn up the heat, you know, which I think this would do.

Mr. FLORES. Mm-hmm.

Dr. JOYCE. Because it would say something bad is going to happen if you do not actually reauthorize the program.

In terms of—you know, I have always had mixed feelings about setting up sort of, you know, extra procedural committees in order to do something that the Congress should be doing itself.

Mr. FLORES. Exactly. I do, too.

Dr. JOYCE. And so, you know, it—that would be—that is a relatively desperate step which does not mean it might not be necessary, it just means I would rather have the Congress do what it is supposed to do.

Mr. FLORES. And Mr. Armstrong, I am down to 14 seconds. So what I will do is ask you to supplementally answer this, or just, unless you can give me a yes or no answer; would these tools be helpful?

Mr. ARMSTRONG. We will supply something for the record.

Mr. FLORES. OK, great. Thank you.

Mr. ARMSTRONG. Thank you.

Mr. FLORES. I yield back the balance of my time.

Chairman YARMUTH. The gentleman yields back. I now recognize the gentleman from New York, Mr. Morelle, for five minutes.

Mr. MORELLE. Thank you, Mr. Chairman. And thank you to the—you and the Ranking Member for holding this important conversation.

My colleague and friend, Mr. Woodall, and I sat through a Rules Committee hearing last week to talk about Article I prerogatives. And so this is very timely that we will be talking about—and as it relates to the power of the purse. So I appreciate that, and I appreciate the witnesses bringing their historical perspective, as well as, their legal perspective on this issue.

I am pretty new to this process. My first term in the House and I suffer because I—my point of reference is state budgeting where I spent two decades in the New York state legislature. And as my friend, Mr. Horsford, and I were just talking about it since we both share state legislative backgrounds, this is a much different process.

So for me, I am—want to ask some basic questions. Professor Chafetz, did I say that right? Close enough?

Mr. CHAFETZ. Oh, yes.

Mr. MORELLE. When the president and the Congress disagree about the legality of an appropriations law, like a funding restriction written into a section of the appropriations law, how does that get resolved?

Mr. CHAFETZ. So for the most part, the Justice Department, through its Office of Legal Counsel, resolves that for the executive branch. The executive branch treats OLC opinions as binding. And then in many cases, that is largely going to be effectively the final word.

There is sort of no—unless Congress wants to come back and do something about that, it is—in many cases, these will be non-justiciable, they will not work their way into the court. And so OLC's judgment on that will sort of stand as the final word.

Mr. MORELLE. So is that like the Red Sox and Yankees dispute a call and the Yankee umpire gets to choose?

Mr. CHAFETZ. Something like that.

Mr. MORELLE. Is that a bad analogy?

Mr. CHAFETZ. No, not bad at all.

Mr. MORELLE. Do you have a—would you suggest a different process or a way to resolve that? Because it does seem to me as though—and not only this Justice Department, but any Justice Department would, I think, be more inclined to agree with the executive. I do not know if that has been the historical trend, but it certainly seems to me that I would expect that to happen. Is there a better way to do that?

Mr. CHAFETZ. You are absolutely right that the Justice Department OLC does tend to side with the executive view on that, and they actually see that as their, in some sense, as their mission. That they take a—they try to interpret the law but with an executive-centered account of the law.

One of the things I suggest in my testimony is what we call non-severability clauses which is to say if you have an appropriation that comes with a rider, you say that, you know, you either take them both or leave them both, right, that you cannot take the appropriation and leave the rider.

And sort of making that explicit in appropriations statutes would then present a much harder choice to the executive branch, right, and for the most part they want these appropriations.

I mean, we talked about the Impoundment Control Act. Sometimes they don't want the appropriations, but assuming they want the appropriation, now they really have to make a harder choice, and that might sort of force them to make a little bit more honest of a choice.

I also think that raises a greater likelihood that you could actually get judicial review of some of these decisions. Because if they don't spend the money, then there are potentially private beneficiaries who would have standing—who would have gotten some of that money who would then have standing to sue and say, "Why didn't we get the money?" And the government will have to say, "Well because we determined that the rider was unconstitutional, and therefore, the appropriation is unconstitutional," and then the court would have the authority to resolve that dispute.

Mr. MORELLE. Very good.

Professor Pasachoff. Did I do justice to—I am really killing names this morning, I apologize.

Ms. PASACHOFF. Pasachoff, but again——

Mr. MORELLE. Pasachoff. If an agency or OMB violates a budget or appropriations law, what happens and how do we find out about those violations?

Ms. PASACHOFF. So some of that is just happenstance. So sometimes something happens to get disclosed and then GAO does its work and writes a report about it and the matter is brought to Congress and the public's attention then.

But when things are not disclosed, there is not sort of an automatic source of——

Mr. MORELLE. There is no systematic way to do it.

Ms. PASACHOFF. There is not an automatic source of knowledge. So one of the things that I write a little bit about in the testimony——

Mr. MORELLE. Yes.

Ms. PASACHOFF [continuing]. the written testimony that I have talked a little bit about today is the importance of transparency and for Congress to claim more tools to force the executive to make transparent some of its spending decisions through, for example, apportionment and through what it does with reprogramming and transfer.

Mr. MORELLE. Yes. Could you talk about that just a little bit? Expand on that. Well I only have about 30 seconds, but can you give us some specificity to that?

Ms. PASACHOFF. Sure. So Congress has granted OMB the authority to further specify the appropriations that Congress, you know, passes into law. And when OMB further specifies, those have the force of law that the agencies have to follow, but Congress—those are not public. Congress never sees what the apportionments—final apportionments are.

Mr. MORELLE. So your recommendation would be a report back to the Congress to——

Ms. PASACHOFF. Exactly.

Mr. MORELLE [continuing]. delineating or detailing what those apportionments are?

Ms. PASACHOFF. Exactly. That all apportionments be made public.

Mr. MORELLE. Very good.

Thank you, Mr. Chairman. I yield back.

Thank you to the panel.

Chairman YARMUTH. The gentleman's time is expired.

May I ask the witnesses, I know it is kind of weird when you are talking to the extremities of the dais here, to make sure you speak into the microphone. I think they had a little trouble hearing you, Mr. Chafetz.

I now recognize the gentleman from Oklahoma, Mr. Hern, for five minutes.

Mr. HERN. Mr. Chairman, thank you.

Witnesses, thank you for being here today. I have been in countless meetings and hearings over the last two weeks, being critical of the President's budget, yet, I hear no criticism of this Committee not doing its budget. And some may argue, "Well that is not the

rule of law.” But I want to read the responsibility of this Committee as on our website.

“The Committee’s chief responsibility is to draft an annual, concurrent resolution on the budget that provides congressional framework for spending and revenue levels.” It goes on to talk about that, so we ought to be critical of this Committee and we ought to be focusing on this Committee’s lack of performance.

You know, I do not blame the Chairman. The Chairman is a great guy, he really is, I think he wants to do a fantastic job. We got it out of Committee last year, but what I do blame is the Speaker, the leader of the House, for not allowing it to get to the floor.

First of all, this year, not even, you know, just basically being up front and not wasting any time because we are not going to even do one. She understands what is going on, we see it in the Presidential candidates’ very divided on their side of the aisle, and I get it.

But still, it was the Speaker who says, “Show us your budget and show your values.” It goes on in our responsibilities. It says, “In the Committee, we pass a budget that”—it reflects our value system, and yet we are not even going to pass a budget.

And so I know, based on what I am hearing here, there is some criticism of the President, and I am not saying there shouldn’t be. But this should be focused on the criticism of this Committee because that is what we have control of, is this Committee.

You know, the budget process must be broken because we have only done it four times since 1974, full appropriations process, both through the resolution process. It is very frustrating. I have talked about it. I am a business guy, there is not a person in here that, when they get into a spending problem, does not create a budget.

So we have got to live within a budget. There is no business that does not do that. There is no state, maybe with the exception of a couple.

We all have balanced budget amendments, programs in our states. The only place that we can continue to do this and point fingers at other people for being the problem, is in Congress. The People’s House. And it is a real problem that, you know, we need to get after.

We keep talking about this, you know, this fix of the budget process. Say Republican Members, as described earlier, worked on this process to change it, and unfortunately, those bills will never see the light of day. I voted for the process as well. It is just really disappointing for so many of us. And I believe that if you took all the Members here and you took us out in the hallway and you interviewed us individually, we would all say, “We have got to do a budget.”

Yet, as I described earlier, the politics does not allow that to happen and the American people, quite frankly, are paying the price. So when we have trillion dollar deficits, it is not the President that is creating trillion dollar deficits, it is the U.S. Congress, us in this room. This is our job.

Now Dr. Joyce, since taking the House, Democrats have failed to write a budget resolution. The budget resolution is the only legislative vehicle which Congress can establish a comprehensive frame-

work for us to legislate priorities and map a vision to allocate its necessary resources.

Do you believe a budget—creating a budget is necessary? We will take Congress out of it. Is it necessary for anything, anyone's long-term fiscal responsibility and important to governing?

Dr. JOYCE. Absolutely. And I would expand by saying that I think there is a tendency, and I think this is true—this is not just true recently. There is a tendency to sort of think forward and think about the fact that, for example, the House and Senate could not possibly agree on a budget, so therefore, one should not be done.

The, you know, the purpose of the Congressional Budget Act, and the reason that the budget resolution was established, was so—the Congress had no way to articulate an overall vision for the budget, it was only dealing with the details. The budget resolution is the only place to look comprehensively at a budget and establish one. And when you do not do that, it is not—it is losing an opportunity to offer what is an alternate point of view to the point of view expressed by the president, regardless of who the president is.

Mr. HERN. So I want to ask you a question. I only have 48 seconds left. I am just going to—I am going to skip past you because I would assume you are going to answer “yes” to this. I am sorry. I can't see him, Dr. Armstrong I think, or Mr. Armstrong, do you think the Budget Committee, you know, let's say in the past 10 years, has done its job appropriately based on the responsibilities laid out here, regardless if Republican or Democrat? I will make it easy on you.

Mr. ARMSTRONG. Well let me just say that—

Mr. HERN. I have only got 23 seconds left. I am trying to get everybody.

Mr. ARMSTRONG. GAO is not in the position to audit the Budget Committee.

Mr. HERN. I am not asking you to audit, I am just asking if we—did we—have produced a budget for you all to be critical of the President and compare budgets?

Mr. ARMSTRONG. I think that is a factual question and I would have to look to see how often a budget resolution has been prepared.

Mr. HERN. You have been there 42 years and you do not know if in the last 10 years there has been a budget produced?

Mr. ARMSTRONG. My focus in appropriations law is really transactional. And that is what I look for. I know that there have been—

Mr. HERN. Sir, I have been here 14 months and I can tell you there has not been a budget passed.

Mr. ARMSTRONG. And well let me just say that I understand. It is clear in the Congressional Budget Act that a budget resolution is an expectation of the act. The Congressional Budget Act though, simply sets rules for the Congress and the Congress can choose how to apply those.

Mr. HERN. I agree with you. And I read that, and you are right, it does not require that we produce a budget. You are right. But our responsibility is laid out by the leadership that says we should produce a budget.

And so that is—that was my point in asking that question. The question, if I had another 10 minutes, is to ask you if this Budget Committee should even exist because we are not doing the job.

Thank you all.

Chairman YARMUTH. The gentleman's time has expired. Now I recognize the gentlewoman from Washington, Ms. Jayapal, for five minutes.

Ms. JAYAPAL. Thank you, Mr. Chairman.

And thank you all for being here. This has been a really interesting hearing. I think you have all articulated very well how Congress' power of the purse is under threat. And I think this Administration, but as we have talked about other administrations, have successfully utilized executive power and taken away some of the power that really should be with us in Congress.

Certainly this Administration has clearly demonstrated how that unchecked executive power can be abused and also exposed the gaps that all of you have spoken about in law that do require congressional action to allow any executive, not just this one, but ones in the future, to truly be required to uphold that balance of powers that our founders envisioned.

Some of the most egregious examples of this recent abuse of executive power have included the following: on February 14, 2019, Congress passed the 2019 Appropriations Bill after the longest partial government shutdown in history. And the sticking point was Donald Trump's demand for \$5 billion in taxpayer dollars to build a wall. Ultimately, Congress appropriated \$1.3 billion, and the very next day, the President declared a national emergency to divert billions of additional dollars to pay for the wall.

Seven months later, the Pentagon revealed the specific military construction projects that would lose \$3.6 billion to pay for that wall. And in February 2020, one year after the emergency declaration, the Pentagon announced another diversion of \$3.8 billion in military funds.

So Mr. Armstrong, under current law, what requirements exist for the White House or relevant agencies to consult with Congress on the projects that are canceled to divert funds for military construction under the national emergency declaration or on specific projects undertaken or on progress of any of those projects?

Mr. ARMSTRONG. The Administration is required to provide Congress notice before it takes an action like that. With regard to the border wall, the Administration and law has authority to transfer money, but it is tied to a notice to Congress. And when Congress gets that notice, you guys can decide what to do with it. But it is—all it requires is a notice before they take the action.

Ms. JAYAPAL. And just to pick up on Representative Moulton's questions earlier, you would not be able to declare a national emergency just for policy purposes or would you?

Mr. ARMSTRONG. I have never addressed that and GAO would stay out of whether or not something is properly declared as a national emergency. When Mr. Moulton and I were talking about an Administration's policy considerations, we were talking about an Administration taking action that was outlawed by the Impoundment Control Act.

Ms. JAYAPAL. Yes. The question still remains. And I understand that you would not weigh in on it, but the question of what determines a national emergency—I do not know, Professor Pasachoff, if you want to comment on that at all?

Ms. PASACHOFF. Oh, thank you. So I do not have the text of the provision in front of me right now, so I cannot refer, specifically. But I will say that there are tools that Congress could put in place using its current authorities, and also new tools that Congress could put in place.

So using its current authorities, Congress could tighten these transfer restrictions. Congress could tighten the reprogramming restrictions, lowering the sums of money that are able to be moved around. Congress could impose—could put in riders, limiting—very specifically saying that no sum can be spent on “X”, so these are all within Congress’ current powers.

Ms. JAYAPAL. And tightening the transfer restrictions, can you—do you have more detail on what that would look like?

Ms. PASACHOFF. Sure. So throughout appropriations law there are general provisions that say that different agencies have the ability to transfer up to certain sums of money without notice—without notifying Congress. And then over that amount of money they do have to notify Congress. And similar things are true in reprogramming.

So a Congress that wanted to restrict those things could simply lower the amounts that were required for notice, and could also just strongly limit the amount that is allowed for reprogramming or moving around at all, or state that it can only be done under certain very specific conditions that Congress sets, and could forbid other kinds of restrictions.

If I could just say one more thing Congress could do within its current power, is respond to actions that the executive has taken that it deems unacceptable in the next year’s appropriation cycle. So—

Ms. JAYAPAL. Thank you. And I only have six minutes, so I did not get to the migrant protection protocols, but I just wanted to say that this implementation of it was something that Congress appropriated zero for in the February appropriations deal. And so I had some questions around that, but I will have to save that for the next time.

Thank you all very much.

Chairman YARMUTH. The gentlewoman’s time has expired. I now recognize the gentleman from Pennsylvania, Mr. Meuser, for five minutes.

Mr. MEUSER. Thank you, Mr. Chairman.

I thank you all for being here with us today. A little earlier, unfortunately, the majority’s vice chair tends to use this forum for political purposes and as political theater. But he earlier generated a question that I am going to pose to Mr. Armstrong.

Based upon your earlier statement about breaking the law, would—can it then be said that a threat made by a senior Member of the White House to withhold funding from a sovereign nation or else, basically? Would that also be against the law?

Mr. ARMSTRONG. A threat to withhold money would not violate the Impoundment Control Act. But an actual withholding of the

money would violate the act. What we found when we looked at Ukraine, and then the decision we issued in January, was that OMB had apportioned the money to withhold it, and that was clear in the apportionment schedules, and the OMB General Counsel acknowledged that in his reply to my letter. And his explanation for the withholding was not one that was acceptable by the—

Mr. MEUSER. And one was proven and the other was not, of course. Thank you for your very inequitable response.

I would like to move on to Dr. Joyce. Dr. Joyce, this congressional seating of budget and appropriations power; When did this start? I mean, the Eisenhower Administration? Kennedy? Johnson?

Dr. JOYCE. Well I mean, it is a complicated answer because there was a time prior to 1980 when, for example, the failure to actually enact appropriations on time did not actually result in the threat of a government shutdown. And then there was a decision in 1980 that there had to be appropriations or agencies had no legal authority to operate.

So that is when the heat really got turned up on the appropriations process. But again, as I said earlier, in only three of the last 44 years, and that is a bipartisan problem, has the appropriations process worked the way it is supposed to.

Now in terms of the budget resolution, as I said in my testimony, the first 20 years of the Budget Act, there was a budget resolution every year. And in the last 20 years, there has only been a budget resolution about half the time.

So if we are looking at the budget resolution itself, I would say it is a problem that has risen, mostly in the last 20 years.

Mr. MEUSER. Is it more of a legal authority, a regulatory authority, or traditional authority that rings true here? Or untrue?

Dr. JOYCE. Well I mean, there is, you know, there is nothing—there is no sanction for the failure to adopt a budget resolution, for example. So I would say that, you know, my view on this is that the Congress, it—when it does not enact a budget resolution—and again, as I said earlier, there are proposals that would say we only do a budget resolution every two years at the beginning of the Congress.

But on some kind of regular routine basis, it is my opinion that there should be budget resolution. And when that does not happen, what essentially is occurring is that the Congress is forgoing its ability to respond to the president's budget.

Mr. MEUSER. Some budget committees and congresses were more successful in accomplishing a budget than others.

Dr. JOYCE. Right.

Mr. MEUSER. Why do you think that is?

Dr. JOYCE. I think there are two possible circumstances where it was easier to pass a budget resolution. One is in situations of unified government. When the House and Senate are controlled by the same party, we do not have this issue of one house deciding not to enact a budget resolution because it cannot imagine the other house ever agreeing with it because it is supposed to be a concurrent resolution.

The other is when there is something big that the Congress has decided it wants to accomplish. In 1990, and again, in 1993, there were big, multi-year deficit reduction packages. Those were bi-

cameral and they also had the agreement of both the Congress and the President, and the budget resolution was used because the reconciliation process is such an effective tool in order to make something like that happen.

Mr. MEUSER. You and I probably cannot—I am new to Congress, so understand this, just as my constituents do not. The lack of courage of the minority to—if they are in leadership in the House—to provide a budget that perhaps would be questioned and needs to show some fortitude for what is best for the overall rather than scoring political points.

But I am out of time. So I yield back, Mr. Chairman.

Chairman YARMUTH. The gentleman yields back. I now recognize the gentleman from Virginia, Mr. Scott, for five minutes.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. I just wanted to remind everyone of this chart that I put up frequently. We have heard about fiscal responsibility. This chart shows that every Republican president since Nixon has ended up with the worst deficit position than they started. Every Democrat has—every Democratic president has ended up with a better deficit position than they started off with.

And this Administration is well on its way to maintaining that pattern. I also have heard comments about proposals on the Democratic side. I would remind the Republicans that under Democratic leadership in the House, we have PAYGO.

So if we are going to enact one of those proposals, like Obamacare, it will be paid for. Obamacare was paid for, unlike proposals on the other side of the aisle, like the prescription drug benefit, you just pass it and do not worry about it.

So I think it is one side—if one side is going to take claim for fiscal responsibility, I think this chart shows which side it ought to be.

Professor Pasachoff, you mentioned appropriations moving money around and notifying Congress. Is that notice or permission, and exactly where does that come from?

Ms. PASACHOFF. So there is two different ways that the executive branch can move money around. One is through a transfer of money, which moves money between different appropriations. There has to be specific statutory authority for the executive branch to do a transfer.

Mr. SCOTT. Without that authority it can't take place?

Ms. PASACHOFF. Without the authority it can't take place. Re-programming, which moves money around within a single appropriations, is generally understood to be something that the executive branch can do, that is part of what Congress allows it to do, when it gives a lump sum authority unless it makes more specific limitations on that.

You asked about notice and permission. So because of the Supreme Court decision that said that one house, one committee cannot be formally—cannot actually give permission because that does not count as legislation, it has got to just be notice. It can be permission, but sort of in a loose, traditional sense; not actually in a mandatory, legal sense.

Mr. SCOTT. The suggestion was made that violations of Antideficiency should be a criminal offense.

Ms. PASACHOFF. So in the current Antideficiency Act, any officer or employee who violates certain provisions of the Antideficiency Act might face administrative penalties like loss of a job or loss of some pay. Knowing and willful violations could become a criminal at.

Mr. SCOTT. Under present law?

Ms. PASACHOFF. Under present law. So the suggestion is that currently, it is not that people are routinely charged under those—with violations. But that allows civil servants to say to political people of whatever party, “I won’t do that. It is against the law. I do not want to go to jail for this.”

So the idea is that there are no criminal penalties. There is no administrative penalties currently in place in the Impoundment Control Act which leaves civil servants really at a loss for how to push back.

Mr. SCOTT. And Professor Chafetz, you were talking about the Antideficiency Act, too. Who has standing to complain after the OLC makes the declaration? Who has standing to complain?

Mr. CHAFETZ. Well that would be sort of appropriation specific. So if there is some party that would have—or this would be under the Impoundment Control Act. If there is some party that would have received a—an appropriation that then does not receive that appropriation, they would have standing to raise that in court.

Mr. SCOTT. In court?

Mr. CHAFETZ. Yes.

Mr. SCOTT. Several of the committees having challenges getting cabinet secretaries to come before their committees to defend their budget. What should the legislative reaction be to failure of a cabinet secretary to show up?

Mr. CHAFETZ. Well I think, you know, the House in recent years, under both Republican and Democratic leadership, has made increasing use of the contempt of Congress mechanism. I think that is certainly available after repeated attempts to get someone to come forward.

And then, you know, one way to enforce contempt of Congress is through the power of the purse, is through saying, “You know what? If you are in contempt of Congress, we are not going to pay your salary next year,” or “we are going to tighten your department’s budget in various ways for next year” in ways that sort of really amp up the pressure—

Mr. SCOTT. Can you aim that sanction at a specific position?

Mr. CHAFETZ. Absolutely. You can zero-out a specific salary in appropriations.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman YARMUTH. The gentleman’s time has expired. And now I recognize the gentleman from Georgia, Mr. Woodall, from—for five minutes.

Mr. WOODALL. Thank you, Mr. Chairman. I was watching Mr. Scott’s eyes get wide at the professor’s suggestion. I do not remember his same enthusiasm during the Obama Administration when we were going down that same path of zeroing out salaries. But we might not have been as close then.

Mr. SCOTT. And what is your point?

[Laughter.]

Mr. WOODALL. The point that I would like for you all to talk a little bit off topic is, you know, we go back and we look at 1974 and the Budget Act, and we look at 1976, the National Emergencies Act. We were kind of united here as an Article I institution reacting against the overreaches of Article II.

I have read your testimony, I have looked at all of your suggestions. But those are largely moot if we are going to continue to operate as a parliamentary institution where the President's party supports the President, and you are a Republican or Democrat first and a member of the Article I second. Being willing to zero out the Trump Administration salaries and not Obama Administration salaries would be one of those things, and the shoe would be on both feet there.

Take me back to when we had a good President from the great state of Georgia, six funding lapses in four years, but no one went without a paycheck, no government services went unmet. I know you might not be able to express an opinion, Mr. Armstrong, but—the opinion helps us in Article I, empowers us in Article I or diminishes us in this funding dance that happens on Capitol Hill? You mentioned it, Dr. Joyce.

Dr. JOYCE. I think it helps you, but it only helps you if you want it to, you know, and what I mean by that is that it basically says that agencies cannot just continue to spend money when the Congress has not provided for that spending. But the record is not very good, as you know, of, you know, having that actually lead to more timely appropriations.

And I think the focus often gets on government shutdowns. And government shutdowns are bad. But the routine practice of continuing resolutions in one's—in my mind is worse. And it is worse because it is more invisible, what the sort of insidious, you know, eating away at the effectiveness of the executive branch is.

And there are all kinds of—GAO actually did a really good study in 2009 that really documented what the problem was that was created by late appropriations being—quite aside from whether there were shutdowns or not.

Mr. WOODALL. Do my two academics share that belief that it is not inherently disadvantageous to Article I and could be a positive? Professor, just—

Ms. PASACHOFF. If I may add, I would just say that it could be even more advantageous if you would import some of it into actual law and specify, for example, what are the—the executive branch can read, very broadly, under different administrations what constitutes the necessarily implied by law. And so the Article I could take even more power back if it would clearly specify examples that you think are—fall into that category and that do not.

Mr. WOODALL. Thank you.

Mr. CHAFETZ. I also agree, and I would point out that while shutdowns are bad, I agree that sort of taking them off the table is worse. And one thing I would point to, for example, is 2011 there was very nearly a shutdown. I think we came within about an hour or two, and that resulted in massive policy concessions across the board from Democrats who controlled both the Senate and the presidency to Republicans, right, that was an example of budget brinksmanship that created massive policy shifts.

And whether or not, you know, various people agree with those policy shifts or not, it was an example of sort of successful tugging on certain powers.

But I agree with Professor Pasachoff, that some of the constraints need to be tightened. And in particular, in the Antideficiency Act, the language that it actually uses is emergencies involving human life or property. And that then, in OLC opinions, becomes essential government personnel, which then becomes manipulated by presidents of both parties to cover huge swaths of the government, but then to exclude things where they want to concentrate pain.

One thing I would urge Congress to do is tighten up the definition of what voluntary services can be accepted during a lapse in appropriations.

Mr. WOODALL. I appreciate that, and I appreciate the focus in so many of your testimoneys about the Antideficiency Act. We have been having administration witnesses come forward to testify on their budgets in this Committee, and those folks have gotten a lot of severe tongue lashings for the ideas they have laid out there. And as my colleagues have mentioned, we have not laid out any ideas; always easy to target folks who have laid ideas out.

All of these things we complain about, we could just fix, right, the chart that Bobby Scott loves to put on the TV of presidents and who is spending what. Presidents do not spend money, right, the question is who was in control of Congress during those times, because the only person who could spend a dime is the U.S. Congress.

We like to target blame, which brings me to the Impoundment Act and adding of the criminal penalties. I do not like putting civil servants in jail. I do not like threatening civil servants with jail. Knowing and willfully, the only standard that would be acceptable. Talk to me about how we have used that threat in the Antideficiency Act, because I do not think kicking public—kicking civil servants is a sport on Capitol Hill. I do not think we need to do that, but we do need better policy outcomes.

Ms. PASACHOFF. May I answer? I see we are—

Chairman YARMUTH. You may answer.

Ms. PASACHOFF. So it has actually taken me a long time to come to terms with this because my initial instinct is I, too, do not want to be punishing civil servants for the hard work that they do on behalf of the American people every day.

Where I have eventually come to is that the—it acts as a deterrent. It actually is—it empowers civil servants to say, “I will not violate the law.” And so that is the good effect that those penalties have. Administrative first, and then criminal for knowing and willful only.

They allow civil servants to push back on supervisors who may be enticing them to break the law. And that kind of parallel penalty structure would empower civil servants in the same way. Not punish them but empower them to resist being forced to violate the law.

Mr. WOODALL. Thank you.

Thank you for your indulgence, Mr. Chairman.

Chairman YARMUTH. All right. You thought you had 10 minutes again. The gentleman's time has expired. I now recognize the gentleman from California, Mr. Panetta, for five minutes.

Mr. PANETTA. Thank you, Mr. Chairman.

And before I get into my opening, I just want to followup on that, Professor Pasachoff. I mean, so you would recommend criminal penalties be in place, and you recommend it as a deterrent it sounds like.

Ms. PASACHOFF. Right. So first, again, just to be clear, these are the same penalties that already exist in the Antideficiency Act, and no one is ever criminally charged, right, so just to be very clear—

Mr. PANETTA. They never have been in history?

Ms. PASACHOFF. GAO actually probably has more information about that than I do, but it is not anywhere near a current—anywhere near a common occurrence. What these penalties allow civil servants to do is say, "I cannot take that action because it would violate the law." So those are the kinds of parallel things I am talking about for the—

Mr. PANETTA. Understood, understood. And what about the Impoundment Control Act? Are there any—I mean you—earlier you talked about administrative criminal which you mentioned just now. In the Impoundment Control Act, what are the penalties?

Ms. PASACHOFF. There are not any.

Mr. PANETTA. Would you recommend there being the same set of penalties starting off with the administrative and starting off with the criminal? In your opinion, would you recommend that?

Ms. PASACHOFF. I would recommend that because it would protect civil servants and allow them to do their job while following the rule of law.

Mr. PANETTA. And when you say "criminal," so you would actually think about fines and incarceration?

Ms. PASACHOFF. I would import exactly the same structure that it currently exists in the Antideficiency Act with the recognition that it acts as a shield, not a sword.

Mr. PANETTA. OK. Great, great.

Professor Pasachoff and all of you, thank you for being here. I appreciate this opportunity in which you can sort of remind us legislators, reinforce the fact that the Constitution is clear, is that we do have the power of the purse and that it is us and not the president that should determine how our government and its programs are funded.

As we have seen, presidents throughout the years have sought to gain more influence over spending. Past presidents have gone beyond simply presenting just a budget, but instead, seeking to move funds for their own priorities, are choosing not to spend them at all against the wishes of this legislative body.

And I think as you are hearing today, clearly, this really is not a partisan issue, and not a partisan issue here in this budget room; whereas, Republicans and Democrats should both be willing to stand up for the authority of Congress, really no matter which party has the power of the executive branch.

And so as we examine the ways to protect Congress' power of the purse, I am glad that we are having this type of hearing, and I do

hope that this session can better inform and motivate us, and our legislative efforts.

Now, one of the areas I think it was briefly mentioned, what I heard just for the first time—and I came in late, so I apologize—were shutdowns. Something that obviously we do not like mentioning too often, but unfortunately, it does happen as I have experienced in my just very limited time here.

Professor Chafetz, what powers and flexibilities does the executive branch have during a shutdown and how might we want to curtail or maybe expand them if possible?

Mr. CHAFETZ. Right. So the executive power during a shutdown is determined by this language in the Antideficiency Act allowing for the acceptance of voluntary services, either when authorized by law, so in some specific statute, or when the—when necessary to preserve human life or property.

Now that could be understood very narrowly, right, you could understand, sort of, necessary to preserve human life or property as being sort of limited to just some subset of the traditional law enforcement agencies or something like that.

Presidents have consistently understood it and relying on OLC opinion since the early 1980's, understood it as a much broader set of civil servants, and exactly how broad is elastic. And basically, OLC has been allowed to have the last word on just how broad that category is. And you can sort of sense their success and the fact that we do not even use that language in ordinary discourse. We do not talk about emergencies involving life or property, we talk about essential government personnel. That language doesn't come from statute, that comes from OLC.

Mr. PANETTA. All right, great. Thank you. Now obviously, you know, in this body you have got hundreds of members and you have thousands of legislative issues. But unfortunately, the time when we think about spending comes just during the appropriation season or when a budget is released it seems like.

And so I would ask, Professor Chafetz, what recommendations do you have as to how we can do a better job in conducting oversight of executive spending actions?

Mr. CHAFETZ. Well a big part of that is—I would say is increase in congressional capacity. And as I mentioned earlier, I think the proposals adopted yesterday coming out of the Modernization Committee are a step in that direction.

But if you look at the number of staff, both member staff, committee staff, and staff at organizations like GAO, CBO, CRS, it is way down from its highs in the 1980's and 1990's. Staff tenure is down, staff real pay is down. Staffers are actually paid less in real dollars today than they were two decades ago.

That really makes it much harder for Congress, as an institution, to do effective and continuing oversight. So my biggest piece of advice in this realm is just that Congress needs to bulk itself up. The administrative state has—is huge and has been growing, not only in absolute terms, but very much relative to Congress, and therefore, relative to Congress' ability to keep tabs on it.

Mr. PANETTA. Thank you. And thanks to all of you.
I yield back.

Chairman YARMUTH. The gentleman yields back. I now recognize the gentleman from Texas, Mr. Crenshaw, for five minutes.

Mr. CRENSHAW. Thank you, Mr. Chairman.

And thank you, everybody, for being here on this very important topic. It has been a really thoughtful discussion and I really appreciate a lot of the interesting suggestions that everyone on the panel has offered.

Oversight to me means a couple things. It is ensuring that we are spending the money properly; ensuring that the executive branch is executing our authorizations properly. And we talked a lot about that. I think on the other hand, oversight also means making sure that we are not saddling our next generation with a burdensome debt, and I want to talk about that in the latter part of my questioning here.

But first, Dr. Joyce, your testimony mentions portfolio budgeting. This is one of the reforms included in the Senate's Bipartisan congressional Reform Act. Can you please explain what portfolio budgeting is and how many portfolios you would envision in a budget resolution?

Dr. JOYCE. Well I mean, essentially, what portfolio budgeting does, and this is an idea that was first advanced by Steven Redburn who used to work at OMB, and the late Paul Posner from George Mason University. And the idea is that, you know, we get pretty focused on whether something is mandatory spending, or discretionary spending, or tax expenditures, for example.

But what is essentially happening is that we have an area like housing and there are a number of different tools that we have in the housing area. And some of them are in the tax code, and some of them are mandatory, and some of them are discretionary. And what this really does is encourages more thinking about which of those tools are most effective in a particular policy area.

So the focus is on the policy area; it is not on whether something happens to be discretionary, or mandatory, or a tax expenditure.

Mr. CRENSHAW. Right. And that would be somewhat of a change to the process. And I mean, are—you mentioned earlier though, that the problem is the operation of the process.

Dr. JOYCE. Right.

Mr. CRENSHAW. Not the process itself. Does that mean—I'm just curious—does that mean we are doomed to never pass a budget correctly, no matter what the process is? I mean, what are your thoughts on that?

Dr. JOYCE. I have thought about what the, you know, what the incentives might be to actually using the process as it was intended. You know, essentially, what has happened in the past is that the process has been used at times when the moon and the stars, you know, sort of aligned and people decided that they wanted to do something.

I mean, what happened in, you know, 1990 that led to the, you know, what was the Budget Enforcement Act, which is where pay as you go came from. For example, was that, you know, the two parties actually got together, and they said, "The deficit is a problem and we want to do something about it."

So it has to start there. And I think that often, there is a tendency to think that there is some cute procedural trick that we can

come up with to make people do things that they do not want to do. But I think that they have to want to do them, first, and then the process can be used as a vehicle to make those things happen.

Mr. CRENSHAW. I was hoping you could also expand on the wording you used in your testimony about how we need a more difficult but important kind of oversight and—what does effective oversight of the executive branch look like?

Dr. JOYCE. I think effective oversight of the executive branch is asking the hard questions about what it is that the Congress intended when it established this program, and is that program accomplishing what it is that the Congress wanted it to do. And that is much harder to do than the kind of oversight that I think you see too much of, which is, you know, somebody did something wrong or someone thinks that somebody did something wrong—

Mr. CRENSHAW. Mm-hmm, right.

Dr. JOYCE [continuing]. and they get hauled before a committee and they get yelled at. Well you know, that is good theater, but it does not—it is not that helpful in terms of making sure the programs operate better.

Mr. CRENSHAW. Right. And that feeds into the suggestion we heard just a minute ago about expanding our own resources to actually identify whether a program is doing well.

On the other side of oversight, I believe, fundamentally is again, getting ahold on the growth of our debt. And as we all know, the numbers are not in dispute. Mandatory spending is by far, the biggest driver of our debt. How can we wrap that into the budget process? What would be a reasonable suggestion to make?

Dr. JOYCE. Well I mean, it is wrapped into the budget process in the sense that it is the budget resolution and the reconciliation process that is the most effective tool in terms of the ability of the Congress to actually change that path.

And so if you do not have a budget resolution, you do not have reconciliation. And if you do not have reconciliation, then it is very difficult to change the path of mandatory spending. I will say at the same time that, you know, that when you have a debt of this size, the answer is not whether you are going to cut mandatory spending or discretionary spending, or whether you are going to cut spending or raise taxes. The answer is all of the above.

And you know, and so I think in the budget resolution, we would have to get to a place where there are changes in mandatory spending and discretionary spending and consideration of revenue increases in order to get out of a hole the size of which we have dug ourselves.

Mr. CRENSHAW. I have run out of time, and of course it is up to the Chairman, but I would love to hear the other panelists' answers to those questions as well.

Chairman YARMUTH. Does anybody want to chime in? Well I will allow it if anybody wants to comment on that.

[No verbal responses.]

OK. The gentleman's time has expired. I now recognize the gentleman from Nevada, Mr. Horsford, for five minutes.

Mr. HORSFORD. Thank you, Mr. Chairman, and to the Ranking Member for holding this hearing, and to our experts.

You know, my constituents and most Americans want Congress to do its job. And I believe the budget process is one of those areas; it is one of the reasons I am honored to be a Member of this Committee.

My colleagues on the other side have said a number of times today, and during previous hearings, that the House Democrats have not done its job. And yet, on August—or excuse me, on July 25, 2019, the House passed Public Law 11637 by a vote of 284 to 149; 65 Republicans voted for that bill including the Ranking Member and several Members of this Committee. That bill set the spending limits through 2021, and it was done in a bipartisan way with both chambers, and it was signed into law by the President of the United States.

So the misleading information that continues to come out from the other side about the House not doing its job, you voted with us to set these spending limits. So let's be accurate about that with the American public.

My question to the panel first is does the Constitution give Congress the power of the purse? Yes or no to all the panelists. Quickly.

Mr. CHAFETZ. Yes. It requires expenditures to be made by law. Congress is the one that passes laws. Obviously, there is Presidential participation in that process, but fundamentally first and foremost, the responsibility rests with Congress, and first and foremost, with this House because of the origination.

Mr. HORSFORD. And that power was not given to any president, correct?

Mr. CHAFETZ. Correct.

Mr. HORSFORD. So the core goal of the U.S. Constitution is to divide powers between all three branches of government in order to prevent any one branch from gaining dominance. The Appropriations Clause in the Constitution states that, "No money shall be drawn from the Treasury, but in consequence, if appropriations made by law."

Mr. Chafetz, you mentioned in your statement that once the Constitution was ratified and the new national government was up and running, the earliest congresses made clear that they understood themselves to have special responsibility for matters of the purse.

Can you expound upon how the first three departments: Foreign Affairs, War and Treasury were set up? And I am specifically interested in how and why Treasury was set up the way it was.

Mr. CHAFETZ. Sure. And one of the first things that the first Congress does when it assembles is creates these first three executive departments—or those first three departments. In the organic statutes, both Foreign Affairs and War, are referred to as executive departments. They are created with the secretary and the secretary's given the authority to hire a clerk, but basically no staff beyond that, and they are required to take direction from the president.

The organic statute for the Treasury Department is different. It does not refer to it as an executive department; it creates a lot more personnel. So in addition to a secretary, it creates a treasurer, a comptroller, and several other officers, and it does not say anything about taking direction from the president.

But it does say that the—it does require all kinds of reporting to Congress, each of these different officers is given special reporting requirements to Congress.

I think what we can take away from that difference in these organic statutes is that the Treasury was seen as being closer to an arm of the legislature than to—than something like Foreign Affairs or War, which were seen as purely executive.

So there is this idea that Congress had this special responsibility right from the beginning for matters of spending.

Mr. HORSFORD. I think that is a very important distinction and something that the structure of the separation of powers is key for all of us to understand. I want to turn finally to the Impoundment Control Act. The Congressional Budget and Impoundment Control Act of 1974 responded to President Nixon's abuse of the apportionment process.

The law reassorted Congress' power of the purse by prohibiting the president from apportioning funds for policy reasons, and by establishing procedures to prevent the president and other government officials from unilaterally substituting their own funding decisions from those of Congress.

Right now, the current President has made unilateral decisions to move congressionally approved funding for various military projects after the House and the Senate agreed, in a bipartisan basis, to not fully fund his request multiple times. We gave him some money to repair fencing along the border, but he wanted even more money to build an ineffective wall which he eventually took from the Defense Department's budget.

I, for one, believe this is an abuse of power. Do you have any recommendations for changes that we should make to the statutes or institutions that shape federal spending decisions? What can we do to protect the separations of powers and make sure the executive branch follows the law when it comes to spending?

Mr. CHAFETZ. May I answer this one?

So one of the big problems in my view with the National Emergencies Act is that when the president does declare an emergency and transfer power, Congress then has the ability to pass a resolution of disapproval. And as you know, both houses did, in fact, pass such a resolution, but not with vetoproof majorities.

I would suggest flipping the burden, so that is to say, have the National Emergencies Act where the president can declare an emergency for a brief period of time, say 60 days, and unless Congress comes in and ratifies that within 60 days, then the emergency goes away, rather than saying that Congress has to come in and undermined the declaration of emergency.

And that would, I think, allow the sort of necessary flexibility for true emergencies, but prevent the abuse of the emergency power for things that really just seem like policy disagreements.

Mr. HORSFORD. Thank you for your indulgence, Mr. Chairman, I yield back.

Chairman YARMUTH. All right. The gentleman's time has expired. I now recognize the gentleman from Texas, Mr. Roy, for five minutes.

Mr. ROY. Thank you, Mr. Chairman.

I thank all the witnesses for taking your time for being here and spending time with us here today.

I appreciate having somebody who is a, I guess, a visiting professor at the University of Texas. I am proud to represent West Campus, which is of course, pretty much fraternities and apartments. I do not have the academic portion; I have the more fun portion of the campus, but I am delighted to have somebody here from Austin.

I introduced, about a year ago, I have to go back and look at the date, H.R. 1755, the Article I Act. It is the companion bill to a bill introduced by Senator Mike Lee in the U.S. Senate. The purpose of which is to sort of reset the way we deal with national emergencies.

Many of you know that there are—I think there has been 59 total emergencies since 1976 declared 33 are still in effect. That is absurd. I mean, it is absurd that we have got emergencies that are—that were declared, and that are still operating, and in effect since the Carter Administration, I believe, if I am correct.

And so I would invite my Democratic colleagues to look at H.R. 1755. It is an effort to, again, reset the way we deal with it by essentially saying in all cases, the president's emergency declaration would unlock emergency authorities for an interim period lasting no more than 30 days. It would basically reverse where we currently just—it kind of continues, and if we do not act, it just keeps going. It would say it ends. And then we have to—Congress has to act or the emergency terminates. I think that would be a better way to go about it, right, is the sort of inherent definition of emergency. So I would be happy to work on a bipartisan basis to try to address that.

Now, I would say that from my standpoint, the power of the purse—and I am wondering how Dr. Joyce feels about this. If we want to exercise the power of the purse to restore the balance of power, if we think that there is a balance of power problem, whether it was under the Obama Administration if you are Republicans, vice versa. Or if we are not even wearing our partisan hats, and we just say, "Look, we just want to try to restore the balance of power between Congress and the executive branch," we always have the ability to act.

We can come together as Congress and say, "Do not fund that," and fill in the blank, whatever it is. We can choose to do that, if we will go through the appropriations process and act.

And just frankly, our real problem is that we do not have an appropriations and/or budget process combined that has us ever sit down as a group of individuals around a table like our families, or any businesses do, and actually do our job.

You know, my family, we all have to sit around and decide, "Well, I mean, our kid is going to do this. Go to this school." "Are we going to have these cars?" "Are we going to," you know, "make these choices?" "Do we take a vacation this year? Do we not?" You know, whatever it is. "Are we going to pay for this healthcare?"

And you have to make choices. But we never do, ever. We literally never make a choice. We just keep spending into oblivion. And now we are at \$23.4 trillion in debt. We are at \$110 million an hour. The White House and this body, no matter what I protest

and vote against, which I probably will, is about to spend an ungodly amount of money in the name of stimulus that won't likely stimulate a damn thing. Not unlike the alleged stimulus from 2009 or 2010.

And what are we going to do? We are going to have, instead of a trillion-dollar deficit this year, we are going to have a \$1.6789 trillion deficit. We have got to stop just going to our partisan corners and shooting at each other by saying, "OK. We want defense spending. We want non-defense discretionary. What the hell? Let's just raise it all, raise the caps."

I respectfully disagree with the gentleman. I just voted against those caps. I voted against those cap increases. I am out right now because of time. I appreciate it. I would like to have a dialog, I would. And we should have a roundtable discussion on this. Let's sit down and just roll our sleeves up and work like any American family does and figure out how to spend within our means. What are the dollars that are going to come in the door and then make the tough decisions that you have to do.

If we do that, I would pause it that Article I would be stronger. That Article I would then be put in a position of balance against Article II. Because right now, we just throw money at the wind and we let those bureaucrats run with it no matter which party is in the White House.

Dr. Joyce, I will just leave it to you to see if you agree or disagree, if you have anything to say on that.

Dr. JOYCE. Well so, I teach budgeting, and I have been public budgeting, and I have been doing it for a long time. And my kids say, "That's a job?" But you know, it is.

And so, you know, I have studied a little bit what effective budgeting looks like. And the thing is, that effective budgeting always involves compromise. And what compromise means is that nobody gets exactly what they want. And when, as you suggest, people just go to their partisan quarters, and you have a group of people that are opposed to one kind of change unalterably, and another group of people as opposed to another kind of change, unalterably. All that means is that you are not able to, you know, to get to agreement.

And so I think we have a budget that is more less on automatic pilot, and automatic pilot is not working. And so, you know, I do not know. Because, you know, if you—I am not a political scientist and it is dangerous for me to pretend to be one. But, you know, we have this sort of disappearance of the moderates, and the moderates used to be the people that actually sort of helped make things happen.

Mr. ROY. Do not imply that I am a moderate or some people back home are going to get a little concerned. I am just kidding.

Thank you, Mr. Chairman.

Chairman YARMUTH. Certainly. The gentleman's time has expired. I now recognize the gentleman from Pennsylvania, Mr. Boyle, for five minutes.

Mr. BOYLE. Thank you, Mr. Chairman. And given the last exchange, let me just say thank you to President Obama and pragmatic Republicans like Hank Paulson and Ben Bernanke. We thank God did not listen to those voices who were preaching aus-

terity and pushed through with the stimulus that helped save our economy—the worldwide economy, and lead to this historic 11-year economic expansion, the longest in American history, right up until this latest crisis with the coronavirus. And I hope that we will all learn the lessons from that history and not retreat to ideological camps.

Now, Mr. Chairman, I want to applaud you for having the vision to hold a hearing like this because too often around here, we spend 99.9 percent of our time dealing with the urgent issue of right now and not taking a step back to have a more thoughtful discussion process-wise about how we can improve things for the future.

In my six years now here, probably the most asinine thing we do are these government shutdowns. So as I went to work on attempting to positively come up with a constructive solution, in my own research, I discovered that this a relatively new phenomenon. That it is only because of a legal interpretation by the Attorney General in the Carter Administration that we even have the concept of government shutdowns.

I introduced legislation that would—that is simply called the “Ban Shutdown Act” that would prevent all future government shutdowns. The way it would work is simply when the appropriation expires, things would continue on autopilot until there was a new appropriation.

Now, I recognize the limitation in that approach. It is certainly not ideal. But my view, it is far superior to this endless cycle of government shutdowns that actually cost us more money and have a negative effect on the economy.

So I would like to ask you what you think about that approach, and frankly, if you could suggest—if you have any suggestions on how we could end this cycle of government shutdowns. If you do not like my legislative approach, then certainly interested in hearing any and all good ideas to once and for all, solve this completely needless problem. And that is open-ended to any one of you.

Dr. JOYCE. I will say that I definitely agree with you about government shutdowns. My concern about automatic continuing resolutions is that what we could end up doing in the first place is taking away, you know, what is—what I would view to be sort of an essential, you know, stick that can be used, which is the threat of a shutdown.

And I think if we get to the place where we are just encouraging more and longer continuing resolutions, that has an effect that is not as visible, but is none the less harmful.

So I really understand your motivation. I do not know if you have seen the bill that Senator Lankford has introduced in the Senate, but he has a similar kind of bill. And the difference in that bill that I have seen is that he not only is prohibiting government shutdowns, but he is actually also doing things like prohibiting all congressional travel until a—you know, until an actual appropriation bills are enacted.

So in my mind, you would have to couple the automatic continuing resolution with some kind of sanctions that force people to come to the table.

Ms. PASACHOFF. If—

Mr. BOYLE. While at the same time not going down the sort of gimmicky—

Dr. JOYCE. Right.

Mr. BOYLE [continuing]. road that sounds great in a populist way but does not actually achieve anything.

Dr. JOYCE. Yes, yes. Not doing things like, you know, just saying people are not going to get paid.

Mr. BOYLE. Yes, that is what I am implying. Yes. Professor—

Ms. PASACHOFF. So I worry about giving away too much Congress' power of the purse if you would go down that route. So respectfully, that is my concern.

Mr. BOYLE. Yes.

Ms. PASACHOFF. I will say that I think a stronger mechanism might be to make it harder for the executive branch to operate during a shutdown. Not again to punish anybody, but when government is allowed to continue funding services and bringing in lots of people which it did during the last shutdown. And different administrations can make different choices. It reduces incentive to compromise. And I think that what you need to end a shutdown, and what you need to get to some kind of work that serves the American people, is to compromise more.

So I would say importing some of those restrictions that we talked about from the OLC memos into law, and further tightening them so that it limits what the executive branch can do to keep a government going, even when there is a shutdown.

Mr. CHAFETZ. If I could just come in real quickly on this. I think also it is worth remembering that government shutdowns are not always caused by congressional failure to pass appropriations.

So the 1994, 1995 shutdowns were passed by President Clinton vetoing appropriations bills, right, so then sort of suggests that it is necessarily Congress' fault. The problem with an automatic CR in my view, is that it basically massively strengthens the president's hand in any kind of bargaining with Congress, right, it says to the president, "As long as you prefer the current levels of spending to whatever Congress might come up with on its own, then just refuse to work with Congress, you will get your automatic CR and it is better." The only way to move off of the status quo on that view would be to move toward the president.

That, in my view, would be a huge abdication of congressional power of the purse. And something like Senator Lankford's proposal does not actually solve that either. It just makes it harder for Congress to stick to its guns. So this would be a massive transfer of power, I think, to the executive branch.

Chairman YARMUTH. The gentleman's time has expired. I now recognize the gentleman from Michigan, Mr. Kildee, for five minutes.

Mr. KILDEE. Thank you, Mr. Chairman, for holding this really important hearing.

Like Mr. Roy, I do share the concern about Congress reasserting its authority. And while we may occasionally travel different paths, and sometimes wind up in vastly different places, when we do come to the same conclusion, even if it is from different motivations, I think we are obligated to work together.

So if that possibility is open, I think we need to pursue it. So I appreciate comments. I do think it is important that we take care to scrutinize not only the spending decisions that we make, and the impact that they have on the national deficit, but the choices that we make about revenue policy, and tax policy, which also have those detrimental impacts.

And so we just need to be honest with ourselves about the effect that our decisions have. Obviously, Congress needs to assert its constitutional authority. The only way that our democracy survives is if we adhere to the rules set forth by our founders in the Constitution. And that means acting when a president fails to adhere to the same set of rules, no matter who that president might be.

The Constitution is clear, the president cannot spend money that is not appropriated by the Congress for specific purposes, and that the president must, must spend those dollars appropriated by Congress for the purposes that we intend.

People in communities all across the country rely on that, not just because of the imperatives that the Congress think, in its collective wisdom, are important priorities, but because that means we are adhering to the rule of law. We are doing what the framers anticipated.

Dr. Joyce, you wrote in the Washington Post that the CBO has put Congress on a more equal footing with the President and made the budget process more transparent. And as a person who long admired Alice Rivlin and, I think, much of her legacy is built upon the foundational work that she did in this space to protect the independents of Congress by ensuring that the CBO played that important role.

Can you, maybe with that as backdrop, offer some thoughts about how the CBO itself promotes a more appropriate balance of power and transparency in this process with the executive branch?

Dr. JOYCE. Well I mean, thank you for having read that, and also, so this is a dangerous question to ask because I wrote an entire book about the CBO, but I will try to do it in a minute.

You know, prior to the existence of CBO, the Congress had no way of systematically challenging information and numbers, really, that came out of the executive branch. And the history of CBO is a history of CBO empowering the Congress to respond to Presidential proposals, both policy proposals and budget proposals. And that was true with the Carter Energy Policy in 1976, it was true with the Reagan budgets in the early 1980's.

And so this enables the Congress to be able to effectively challenge the executive branch. It also very importantly, gives the Congress a nonpartisan source of information on just what the effects of various policies are.

Prior to the existence of CBO, if you wanted to ask how much a bill cost, then there were two sources of information for that. There was either the committee that produced the bill, which had every incentive to downplay the cost of the bill, or there was the executive branch, which miraculously, thought bills that it didn't like cost a lot of money. And bills that it did like, did not cost much money at all.

Mr. KILDEE. I wonder if you might comment. This may have been covered before I arrived, it has been a busy day. And what tools you might suggest that the CBO be granted—

Dr. JOYCE. Mm-hmm.

Mr. KILDEE [continuing]. in order to more effectively deal with what we have had recent examples of. And to be fair, I am sure there are examples that cross the span of time, but there have been more egregious examples of the Administration withholding money that Congress appropriated for a specific purpose, or spending money that Congress did not approve for a specific purpose. Can you talk to any of the tools that you think CBO, specifically—

Dr. JOYCE. Right.

Mr. KILDEE [continuing]. or any other agents of government should have in their hands to prevent that?

Dr. JOYCE. Well I mean, you know, it is really GAO that is in the position of, you know, opining in terms of whether the Administration has effectively followed the law or not. Because it is GAO that gets involved in the, really, the budget execution process. You know, CBO is more sort of upfront when you are making decisions on what to do.

You know, I am hesitant to say that CBO should have any enforcement authority because I think the whole idea of being a non-partisan agency and then having enforcement authority is just going to get it in a lot of trouble.

So CBO is about providing information, and then it is up to the Congress how it wants to use that information.

Mr. KILDEE. Thank you.

My time is expired. I yield back.

Chairman YARMUTH. The gentleman's time has expired, and I yield myself 10 minutes for questions.

And once again, let me thank the entire panel for your testimony and your responses. It has been one of the, I think, most impressive presentations by—nonpartisan presentations of a group of witnesses we have had since I have been Chair.

And I just want to reference one thing Mr. Roy said about how we should all sit around and talk about this. We did that in 2018; that was the joint select committee, 16 of us, the entire year, and virtually every question or point that has been made here about possible proposals, and so forth, was made then.

And for one reason or another, we could not get 10 votes out of 16 to do it. And that was also a very, very nonpartisan process. Everybody on that group, the eight Democrats and eight Republicans, four each from the Senate and the House, was very interested in solutions and not gaining partisan advantage.

And so it was a very, I think, a useful discussion. And I think virtually everyone who came out of that discussion, out of that process of almost a year's duration, said, I think as you may have said, Dr. Joyce, it was not the process, it is the will of the Members of Congress.

And that is one of the things that in my—this is now my 12th year on the Committee, and that has been very frustrating, but so obvious about the budget resolution process that we have had because it has been basically just an opportunity for scoring partisan points.

The process was never really designed to be a governing process, and I think that is symptomatic of what confronts this government right now—this Congress right now, is that we do not really have a governing mentality here. We have an electoral mentality. Almost regardless of what the issue is, the strategy is, “How do I get an electoral advantage on this issue?” Not, “What is the best policy for moving the country forward or solving a problem?”

And I do not know how we get past that, but until we do, and actually begin to govern, I think—I was a staffer here in the 1970’s when you had virtually the entire philosophical spectrum in both parties. And I was a staffer on the Senate side. And so you were always working across the aisle because there was always somebody who agreed with you across the aisle. And a party was not nearly as significant. We have become very tribal as everyone says, and so it is a different environment.

I want to focus on one thing though. And believe me, I have great empathy with the Republicans on the Committee and in the House because I spent eight years in the minority. Nobody on this Committee, until last year, has spent any time in the minority and it is frustrating. It is frustrating.

So you do things like batter the Committee for not passing a budget resolution, when in fact, of course, Senator McConnell announced early this year that they were never going to bring a budget resolution to the floor in the Senate.

But one of the things I am curious about, and to see if any—I will leave it open to any of you—is if there are any changes you might see in the 1974 Act that would help? And that is specific, one point I would question you about is the idea that ever since we have been here, every budget resolution that has been proposed, whether it has been passed or not, was a 10 year resolution.

I think the act requires us to do five years. In this day and age, there is no way to write a budget for 10 years. A budget resolution that is meaningful in any respect. And both sides have played incredible games with the budget to make it look good.

I remember one time when we were in the minority, but Republicans proposed a budget and they had some 600 and something million dollar category. And we asked them what that was. And they said, “Well we just made up a number. We had to get that number.”

So they put the number in, and then, you know, lots of gimmicks on estimates of growth and so forth. You know, president’s budget estimates 3 percent growth right now what looks like to—everyone’s prediction was it would be no more than 2. Now it looks like it is going to be zero the rest of the year and 1 percent next year. That was unforeseen.

So the question I have is would that make sense to say, “You just have to do a budget?” One-year budget or a 2-year budget resolution or any other changes you might see in the Budget Act that might help?

Dr. JOYCE. Well if I could respond first, I think—you know, I was—I do not remember what year it was, but there was a year in which, you know, we moved from five years to 10 years. And the reason as I recall we moved from five years to 10 years is because

people were always doing things where the costs exploded in year six, right?

Chairman YARMUTH. Right.

Dr. JOYCE. And it is sort of more difficult to do things where the costs explode in year 11. I mean, it is so far you know, into the future. But I think obviously the downside of doing 10 years is that it is so hard, you know, to—with any kind of reliability to say what is going to happen in 10 years.

I would be concerned about going much shorter than five, only because I think you do create those incentives that if you do a 2-year resolution, then magically, you know, people are going to create programs where the costs get a lot bigger in year three, for example.

Chairman YARMUTH. Has anybody ever had a sense of that? Or any other aspect of the budget?

Dr. JOYCE. And I would just say that in terms of the—in terms of changes to the Budget Act itself, you know, the one that I suggested in my testimony, and I think it is worth considering, is just whether there are things that we could do to make this Committee more powerful.

And obviously, making it more powerful if the Committee is not going to actually exercise that power does not do a lot of good. But you know, ideas like, do you want to actually, you know, put Chairs and Ranking Members of the, you know, important money committees on this Committee? Do you want to sort of, you know, strengthen the budget resolution itself, the enforcement procedures behind it, things like that.

Chairman YARMUTH. Yes. I was impressed by that recommendation. I would love to have a—chair a committee on government priorities. That would be a pretty interesting thing to do.

One of the things that we have done this year, because we have limited jurisdiction and the budget resolution process is not working, was to actually consider this Committee the oversight on the budget.

So we have had hearings on various things like—and Mr. Johnson said we had a hearing on the Green New Deal. We did not. We had a hearing on climate change and how it is going to impact—how it is impacting the budget and how it might impact the budget. We are going to have a hearing later this year on artificial intelligence and how that may impact the budget. We have had immigration reform and how that affects the budget. And those are—and the idea was to assemble information that might be useful to the legislating committees of those areas—the committees of jurisdiction.

But I think you are very right on point that this Congress has to do a better job of oversight in every respect. I wrote an op-ed about that several years ago and said that—and this—that we have had—you look at the Communications Act of 1934. There is still things on the books from the 1934 Communications Act.

And I mentioned to—when I was on the Energy and Commerce Committee, I mentioned to the chairman then that if he wanted to sponsor a bill to basically eliminate everything in the Communications Act that was not passed prior to 1996 that—which was the prior—last prior reauthorization, I would be happy to cosponsor it

with him because you cannot—nothing can be relevant to today's world that was passed before that.

So that is something that this Congress absolutely has to do if we are going to advance legislation—and I think, Mr. Roy, we are talking to you about including your recommendation in that—that deals with the issues that we have had here.

This hearing was designed to be kind of a prelude to that legislation. And a lot of the recommendations that were in your testimony are going to be a part of that and we appreciate that.

But if there were one thing that you would think is the most important change we can make in order to reassert our power of the purse, what would it be? The most important recommendation.

Mr. CHAFETZ. I would say limitations. I mean, this may be fighting the question because it will be a little broader than one specific thing. But limitations on the president's ability to either transfer funds, reprogram funds without some serious indication of congressional acquiescence, or refuse to spend funds that have been transferred that is—that have been appropriated.

That is to say, to tighten up both the Impoundment Control Act and to, as Mr. Roy suggested, flip the burden on emergency spending and on transfer authority under that.

Ms. PASACHOFF. I think the number one important thing to do is to make things more transparent. So you cannot hold—you keep talking about—we have talked a lot about oversight today. It is impossible for Congress to hold—to have oversight over the executive branch if you do not know what the executive branch is doing.

So I think that apportionment transparency, making the apportionments public, they are final legal documents. I do not understand how in a rule of law country we can have things with the force of law that are not transparent, that are not public. And some sort of compendium, some sort of greater requirement for transparency of reprogramming and transferring actions.

Chairman YARMUTH. Mr. Armstrong.

Mr. ARMSTRONG. I agree with both of the professors here, but one thing I would add is, as has been made clear in the hearing, the Antideficiency Act is the only fiscal statute which carries penalties for violation of the act. I think that the Committee might want to consider imposing penalties for other fiscal statutes like the Impoundment Control Act, but also like the purpose statute.

I know that criminal penalties sound somewhat Draconian, but Professor Pasachoff is right in that, what we have seen over history is, even though the Department of Justice has never prosecuted anyone for a criminal violation of the act, it is a deterrent. And that is why GAO gets tons of requests every year for appropriations law training, because the people who actually have to execute the budget want to make sure that they are doing the right thing.

And we hear in just about every class we teach, "I do not look good in orange stripes." Things like that, you know, and so it gets attention and collateral. To that, I think I would expand the executive officials who have a right to ask for a decision from GAO. Currently it is heads of agencies and agency components, as well as, some offices called Accountable Offices. But if you expand it to the budget people, you expand it to contracting officers.

I think we are more likely, even if we do not get the request for decisions, and I hope it does generate into request for decisions, but even if we do not get that, we are available for informal technical assistance and people are more likely to reach out. And when they reach out, we are making sure that they are acting in compliance of the laws that you guys enact.

Chairman YARMUTH. Thank you.

Dr. JOYCE. May I?

Chairman YARMUTH. Yes, Dr. Joyce.

Dr. JOYCE. So I want to say I agree with all of these. The one I would add, I would go back to something Professor Chafetz said, which is that if you are going to do effective oversight, and you are going to be a strong counterbalance to the president, you need the resources to do that. You need the staff to do that.

And it is sometimes very hard, politically, for the Congress to spend money on itself. But when it doesn't spend money on itself and it—and its support agencies and its staff, you know, you are really at a competitive disadvantage.

And you know, one of the reasons Congress does not do better oversight is perhaps because it does not have incentives to do so, but also because it takes a lot of resources, a lot of staff resources, in order to actually figure out what is going on in these executive agencies. And I think that is a very—that would be a very important thing to do.

Chairman YARMUTH. Well once again, my time is long expired, but I have the gavel, so—

[Laughter.]

But I wanted to hear those responses, and once again, thank you for your contributions, they have been very useful. And if there is no further business, the hearing is adjourned.

Hold on I'm sorry, it is not adjourned yet. I have a housekeeping act that I neglected earlier.

As a reminder, Members can submit written questions to be answered later in writing. Those questions and your answers will be made part of the formal hearing record. Any Members who wish to submit questions for the record may do so within seven days.

With that, this hearing is adjourned.

[Whereupon, at 12:23 p.m., the Committee was adjourned.]

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**STATEMENT
HEARING:**

**“PROTECTING CONGRESS’ POWER OF THE PURSE
AND THE RULE OF LAW”**

COMMITTEE ON THE BUDGET

210 CANNON

MARCH 11, 2020

10:00 A.M.

- Thank you Chairman Yarmuth and Ranking Member Womack for convening this hearing on protecting Congress’s power of the purse and the rule of law.
- Let me welcome our witnesses:

Thomas H. Armstrong
General Counsel
U.S. Government Accountability Office

Josh Chafetz, Professor of Law, Cornell Law School and
Visiting Professor
University of Texas at Austin School of Law

Eloise Pasachoff
Associate Dean and Agnes N. Williams Research Professor
Georgetown University Law Center

Dr. Philip Joyce
Senior Associate Dean and Professor
University of Maryland School of Public Policy

- The Framers understood that the separation of powers in the structure of the federal government is essential to protecting liberty and preventing a backslide into monarchy.
- The Framers knew it was essential that the power to decide how to spend the people's money be vested in the Congress, not the President.
- In fact, to assuage concerns that the "President may easily become king . . . [and] prescribe the terms on which he shall reign as master," the Framers placed the power of "the purse in the hands of the representatives of the people," because "where the purse is lodged in one branch, and the sword in another, there can be no danger."
- The Framers saw in the "power of the purse . . . the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."
- The Constitution seeks to ensure that the purse will always remain with Congress in several provisions.
- In Article I, Section 7, clause 1, the Constitution vests the Money Power to raise revenue in the Congress providing that "All Bills for the raising of revenue shall originate in the House of Representatives."
- Article I, Section 9, clause 7, the Appropriations Clause mandates that "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."
- An appropriation is a law that makes specified funds available for particular purposes.

- The Constitution also mandates the publication of a regular statement and account of receipts and expenditures, prohibits appropriations of longer than two years to support the armed forces, and grants the Congress the power to tax and to spend.
- Under the U.S. Constitution, control of the purse is not just a power of Congress, it is also a responsibility.
- That responsibility falls particularly strongly on the House of Representatives, which with bi-annual elections for all members is the most democratically accountable branch of government.
- This is why the founding generation believed that “[a]mong the duties—and among the rights, too—of th[e] House, there is perhaps none so important as the control which it constitutionally possesses over the public purse.”
- Importantly, appropriations give the House a power it can exercise unilaterally, even despite opposition from the Senate; the House can refuse funding on its own (as can the Senate, and the President unless there are enough votes to override a veto).
- This makes appropriations in general and the power to refuse funding in particular a rare tool that a bare majority that captures the House of Representatives can use to pursue the goals of the people who elected it.
- Even as Congress has created this administrative state, however, it has fulfilled its responsibility to control spending under the Constitution by enacting foundational laws that constrain federal agencies’ exercise of delegated power when it comes to spending.
- Two of the most important of these laws are the Anti-Deficiency Act and the Impoundment Control Act.
- The Anti-Deficiency Act prohibits agencies from spending or obligating funds they do not have, with limited exceptions and is Congress’ response to the threat that agencies’ funding deficiencies pose to Congress’ control of government spending.

- An “obligation” is a legal liability of the government to make a future payment, such as through awarding a grant or entering into a contract. (Congressional permission for an agency to take actions to obligate the government to make a future payment is called “budget authority.”)
- A “deficiency” occurs when an agency over-obligates or over-spends its enacted appropriations.
- Deficiencies are a threat to the power of the purse because by creating them agencies effectively force Congress to appropriate the funds necessary to honor the government’s prior commitment.
- The Anti-Deficiency Act includes limited exceptions that have proven incredibly consequential during lapses in appropriations (i.e., shutdowns).
- Presidents have asserted increasing authority to continue government operations without the necessary funding in place through flexible, atextual, and often undisclosed interpretations of the limited exceptions in the Anti-Deficiency Act.
- In general, the Anti-Deficiency Act requires the President to apportion, in writing, all appropriations enacted into law for the executive branch.
- An apportionment is a legally binding document that allows an agency to spend its enacted appropriations.
- The overarching purpose of the apportionment process is to prevent deficiencies—i.e., to make sure agencies use time limited appropriations at an appropriate pace (so that, for example, a program does not run out of money before the fiscal year is over) and use appropriations available for an indefinite time period effectively and economically.
- The Office of Management and Budget, via delegation from the President, approves all apportionments for the executive branch.
- Apportionments generally divide amounts by specific time period or among projects or activities.

- They may contain footnotes, which provide additional direction to agencies and are also legally binding.
- After funding has been apportioned, agencies decide how to further allocate it, provided that such decisions are consistent with the apportionment and enacted law.
- President Nixon's abuse of this "apportionment" process led Congress to enact a second foundational budget and appropriations law, the Impoundment Control Act, which reasserted Congress' power of the purse by prohibiting the President from apportioning funds for policy reasons and by establishing procedures to prevent the President and other government officials from unilaterally substituting their own funding decisions for those of the Congress.
- The ICA lays out procedures the President must follow to reduce, delay, or eliminate funding in an account.
- The Act divides impoundments into two categories: rescissions and deferrals.
- If the President wants to spend less money than Congress provided for a particular purpose, they must first secure a law providing Congressional approval to rescind the funding in question.
- The ICA requires that the President send a special message to Congress identifying the amount of the proposed "rescission"; the reasons for it; and the budgetary, economic, and programmatic effects of the rescission.
- Upon transmission of such special message, the President may withhold certain funding in the affected accounts for up to 45 legislative session days.
- If a law approving the rescission is not enacted within the 45 days, any withheld funds must be made available for obligation.
- The ICA defines a "deferral" as withholding, delaying, or – through other Executive action or inaction – effectively precluding funding from being obligated or spent.

- The ICA prescribes three narrow circumstances in which the President may propose to defer funding for a program: (1) providing for contingencies; (2) achieving budgetary savings made possible through improved operational efficiency; and (3) as specifically provided by law.
- The ICA requires that the President send a special message to Congress identifying the amount of the proposed deferral; the reasons for it; and the period of the proposed deferral.
- Upon transmission of such special message, the funds may be deferred without further action by Congress; however, the deferral cannot extend beyond the end of the fiscal year in which the special message is sent.
- The ICA language on deferrals is long-standing budget law that allows the executive branch to delay the obligation or expenditure of funding only for the specified reasons rather than policy reasons.
- Mr. Chairman, there is no higher priority than the safety, security, health and well-being of the American people.
- All Americans are concerned about the Coronavirus, it is evolving into a global epidemic that is quickly spreading.
- The main priority of this government and every government around the world should be combating the spread of this virus.
- We cannot afford to nickel and-dime our response to public emergencies like the coronavirus pandemic.
- It is imperative that our allies and partners around the world obtain the diagnostic equipment, medical supplies, doctors, workers, hospitals and any additional resources essential to stopping the spread of this virus.
- We must take preventative actions in combating the coronavirus to ensure stability in our economy, education, farmlands, local

business, food security, and the health and wellbeing of all our citizens.

- Every urban, suburban, and rural area of America will be impacted from this virus, these areas need of materials and resources that can best help to combat the coronavirus.
- Mr. Chairman, the Power of the Purse is an indispensable weapon in the arsenal given to Congress by the Constitution's Framers to promote the general welfare, provide for the common defense, and to preserve our democracy.
- I look forward to hearing from our witnesses on ways to ensure that this power is preserved and strengthened so that our democracy endures for ages to come.
- Thank you; I yield the remainder of my time.

**House Budget Committee Hearing on
Protecting Congress' Power of the Purse and the Rule of Law
March 11, 2020
Questions for the Record
Chairman John A. Yarmuth**

Questions for Thomas Armstrong, General Counsel, U.S. Government Accountability Office (GAO)

Separation of Powers and GAO's Role

The Constitution vests the power of the purse with the Congress, and GAO has a special responsibility to assist Congress in ensuring that the Executive Branch is adhering to budget and appropriations law. This generally requires that the Executive Branch share budgetary and other information, and it also requires that the Executive Branch respect that the power of the purse rests with Congress and that GAO serves Congress in protecting its power. You discussed this in your testimony, and I have a few follow-up questions.

First, you noted in your testimony that you are concerned with the change made this past year to the long-standing practice of Antideficiency Act reporting, whereby the Executive Branch will no longer report Antideficiency Act violations to Congress in response to GAO's determination that a violation has occurred.

- Can you explain what has changed and what concerns you about this change?
- Why is it important for Congress to receive information about violations of the Antideficiency Act, in general?
- Why is it important for Congress to receive information from Executive Branch agencies when GAO concludes that the agency has violated the Antideficiency Act, but the agency disagrees with GAO's conclusion?

You also noted in your written testimony that an Executive Branch agency's failure to provide comprehensive responses to GAO's requests for information can have constitutional significance.

- Why is an agency's failure to respond to GAO constitutionally significant?

Not all of the legally binding decisions issued by the Department of Justice's Office of Legal Counsel (OLC) on budget and appropriations law are made available to Congress or to the public, but it is my understanding that there are some differences of legal interpretation between GAO and OLC. You mentioned in your testimony that there are currently some disagreements between GAO and the Executive Branch regarding the interpretation or application of the Impoundment Control Act and the Antideficiency Act.

- Could you identify and summarize those areas of legal disagreement?

- Do you have views or recommendations on what Congress can do to strengthen congressional control or congressional review regarding those areas of disagreement?

Lapse in Appropriations and the Antideficiency Act

Mr. Armstrong, in the last several months, GAO has issued several new legal decisions regarding the application of exceptions to the Antideficiency Act during the partial lapse in appropriations or partial government shutdown that occurred in fiscal year 2019.

- Could you highlight some of the key findings in these legal decisions for the Committee?

In addition, I have a few other questions about these decisions and about the Antideficiency Act.

- Could you explain why some of these decisions include discussion about knowing and willful violations of the Antideficiency Act and the applicable criminal penalties? For example, the GAO legal decision, *Office of Management and Budget—Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriations*, B-331132: Dec 19, 2019, states the following:

“With this decision, we will consider any future obligations of this nature in similar circumstances to be a knowing and willful violation of the Antideficiency Act. The Act provides, in that event, that officials responsible for obligations in violation of the Act shall be ‘fined not more than \$5,000, imprisoned for not more than 2 years, or both.’ 31 U.S.C. § 1350.”

- What recommendations do you have to help Congress ensure that Executive Branch agencies do not violate the Antideficiency Act, in the event of a future lapse in appropriations?
- Are there legislative improvements that the Congress could make to the Antideficiency Act to address the type of violations that you identified or to protect its power of the purse more generally?

Questions for the Record
 From Chairman John A. Yarmuth
 For Thomas H. Armstrong
 Hearing on Protecting Congress' Power of the Purse and the Rule of Law
 March 11, 2020
 House Committee on the Budget

Separation of Powers and GAO's Role

The Constitution vests the power of the purse with the Congress, and GAO has a special responsibility to assist Congress in ensuring that the Executive Branch is adhering to budget and appropriations law. This generally requires that the Executive Branch share budgetary and other information, and it also requires that the Executive Branch respect that the power of the purse rests with Congress and that GAO serves Congress in protecting its power. You discussed this in your testimony, and I have a few follow-up questions.

First, you noted in your testimony that you are concerned with the change made this past year to the long-standing practice of Antideficiency Act reporting, whereby the Executive Branch will no longer report Antideficiency Act violations to Congress in response to GAO's determination that a violation has occurred.

• Can you explain what has changed and what concerns you about this change?

In Circular No. A-11 (A-11), the Office of Management and Budget (OMB) had long required each executive branch agency to report to Congress on any Antideficiency Act violations found by the U.S. Government Accountability Office (GAO). See, e.g., OMB Cir. No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 4, § 145.8 (June 2018); OMB Cir. No. A-11, pt. 4, § 145.8 (July 2007) (revised Nov. 20, 2007); OMB Cir. No. 34, *Instructions on Budget Execution*, pt. 2, § 22.8 (Nov. 7, 1997). The OMB guidance allowed agencies to express any disagreement with GAO's decision in that report. See, e.g., OMB Cir. No. A-11, pt. 4, § 145.8 (June 2018); OMB Cir. No. A-11, pt. 4, § 145.8 (July 2007) (revised Nov. 20, 2007); OMB Cir. No. 34, pt. 2, § 22.8 (Nov. 7, 1997). However, in June 2019, OMB revised A-11 to require each executive branch agency to report Antideficiency Act violations only if "the agency, in consultation with OMB, agrees that a violation has occurred." OMB Cir. No. A-11, pt. 4, § 145.8 (June 28, 2019). I am concerned that this change to A-11 may result in fewer Antideficiency Act violations being reported by executive branch agencies to Congress, particularly where an agency or OMB disagrees with GAO's conclusions. More importantly, agencies' failure to report these violations may diminish congressional oversight over the executive branch and its ability to protect its constitutional prerogatives of the purse through the Antideficiency Act. Due to my concerns with these changes, I sent a letter to agency general counsels informing agencies that if they fail to report a violation found by GAO, we will report the violation to Congress. B-331295, Sept. 23, 2019.

• Why is it important for Congress to receive information about violations of the Antideficiency Act, in general?

By prohibiting government officials from obligating or expending in excess of or in advance of appropriations, the Antideficiency Act serves to protect and underscore Congress's constitutional prerogatives of the purse. See U.S. Const., art. I, § 9, cl. 7 (power of the purse,

statement and account of public money); 31 U.S.C. § 1341(a)(1)(A). Indeed, the Antideficiency Act has been called "the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds." Gary Hopkins & Robert Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 56 (1978). Often, Congress only becomes aware of an Antideficiency Act violation after it receives a report from the executive branch agency that violated the act or is made aware of a violation through a GAO decision or report. Once Congress is made aware of an Antideficiency Act violation, it may use its legislative and oversight powers to hold the agency to account and to prevent the recurrence of a similar violation. But when an executive branch agency fails to notify Congress about an Antideficiency Act violation, Congress might not be aware that an Antideficiency Act violation occurred, losing an opportunity to prevent a recurrence of the violation and to protect its constitutional prerogatives of the purse.

• Why is it important for Congress to receive information from Executive Branch agencies when GAO concludes that the agency has violated the Antideficiency Act, but the agency disagrees with GAO's conclusion?

Requiring executive branch agencies to report Antideficiency Act violations found by GAO, even where those agencies disagree with GAO's conclusions, makes Congress aware of these violations and enhances congressional oversight of executive spending by providing Congress with critical information while respecting separation of powers. Such reporting also supports GAO's role in serving Congress's constitutional power of the purse. In addition, receipt of these reports allows Congress to independently consider whether an Antideficiency Act violation occurred. And Congress can use its legislative powers to enforce GAO's decision and protect its power of the purse. Indeed, Congress has done so on more than one occasion. See, e.g., H. Res. 644, 113th Cong. (2014); 160 Cong. Rec. H7325, H7335 (2014) (explaining that the House of Representatives voted 249-163 to condemn and disapprove of the Department of Defense's transfer of five individuals detained at Guantanamo Bay, Cuba, to the nation of Qatar without providing the statutorily required notice in advance to certain congressional committees, when GAO found that such action violated the Antideficiency Act).

You also noted in your written testimony that an Executive Branch agency's failure to provide comprehensive responses to GAO's requests for information can have constitutional significance.

• Why is an agency's failure to respond to GAO constitutionally significant?

The Constitution vests lawmaking power with the Congress. U.S. Const., art. I, § 8, cl. 18. When Congress enacts appropriations, it has provided budget authority that agencies must obligate in a manner consistent with law. Since our establishment in 1921, GAO's mission as a nonpartisan, legislative branch agency has been to support congressional oversight of executive spending. The executive branch's failure to respond to GAO's requests for information as we carry out this role interferes with Congress's constitutional oversight responsibility.

Not all of the legally binding decisions issued by the Department of Justice's Office of Legal Counsel (OLC) on budget and appropriations law are made available to Congress or to the public, but it is my understanding that there are some differences of legal interpretation between GAO and OLC. You mentioned in your testimony that there are currently some disagreements between GAO and the Executive Branch regarding the interpretation or application of the Impoundment Control Act and the Antideficiency Act.

• **Could you identify and summarize those areas of legal disagreement?**

We are aware of two areas of disagreement between GAO and the Department of Justice's Office of Legal Counsel (OLC). First, GAO and OLC disagree as to the application of the Antideficiency Act to violations of spending restrictions in permanent statutes. OLC asserts that a violation of a spending restriction enacted in a permanent statute does not violate the Antideficiency Act. Memorandum Opinion for the General Counsel, Environmental Protection Agency, *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, OLC Opinion, Apr. 5, 2007. In OLC's view, the Antideficiency Act does not apply to funding restrictions that are not enacted in an appropriations act. *Id.* at 1. OLC points to phrasing in the act that prohibits making "an expenditure or obligation exceeding an amount available *in an appropriation*." *Id.*, at 12 (alteration in original) (citation omitted). GAO disagrees. The Antideficiency Act extends to all provisions of law that apply to an agency's use of its appropriations. B-317450, Mar. 23, 2009, at 5. If a statute—whether enacted in permanent law or an appropriations act—prohibits the use of agency appropriations for a particular activity, the agency does not have an amount legally available in any appropriation for that purpose. *Id.* Accordingly, any obligation or expenditure of the appropriation for the prohibited purpose would result in a reportable Antideficiency Act violation. *Id.* OLC's conclusion results in an anomalous policy through which Congress's choice of legislative vehicle for a funding restriction—permanent law or appropriations act—determines whether a violation of the restriction would result in a reportable Antideficiency Act violation.

Second, GAO and the executive branch disagree as to the extent of the authority provided to the President by the Impoundment Control Act. GAO issued a legal decision concluding that the President does not have the legal authority under the Impoundment Control Act to withhold budget authority through its date of expiration. B-330330, Dec. 10, 2018; B-330330.1, Dec. 10, 2018. Specifically, we concluded that an interpretation of the act under which the President has the legal authority to withhold budget authority through its date of expiration would allow the President to rescind budget authority without congressional action, which would be inconsistent with the constitutional principles of bicameralism and presentment. B-330330; B-330330.1. OMB argues that, because the act is silent on this point, the act permits the President to withhold budget authority through its date of expiration. Letter from General Counsel, OMB, to General Counsel, GAO (Nov. 16, 2018), at 1–2. OMB notes that the act imposes express limitations on the President's ability to propose deferrals beyond the end of the fiscal year. *Id.*

• **Do you have views or recommendations on what Congress can do to strengthen congressional control or congressional review regarding those areas of disagreement?**

To ensure that executive branch agencies properly report violations of funding restrictions enacted in both appropriations acts and permanent statutes, Congress might reinforce the act by either amending the text of the Antideficiency Act or enacting an additional permanent statute to declare that violations of funding restrictions—whether enacted in an appropriations act or not—are also violations of the Antideficiency Act.

To underscore GAO's decision that the withholding of budget authority through its date of expiration is prohibited, Congress might amend the Impoundment Control Act to: expressly prohibit rescission proposals for budget authority that will expire within 60 days; require that executive branch officials release budget authority that is subject to a rescission proposal or deferral in time to be prudently obligated; or provide an additional 100 days to obligate budget authority that is released after being withheld pursuant to a special message, even if the budget authority was scheduled to expire sooner. The first proposal would establish clearly that the

executive branch may not transmit end-of-the-fiscal-year rescission proposals of budget authority that would expire without congressional action. Further, the second proposal would ensure sufficient time for agencies to obligate amounts for programs needing more than 60 days to prudently obligate budget authority. The third proposal would give agencies additional time to obligate budget authority proposed for rescission or deferral. Where budget authority has been unlawfully withheld through its initial date of expiration, this extension would facilitate the prudent obligation of the budget authority.

Lapse in Appropriations and the Antideficiency Act

Mr. Armstrong, in the last several months, GAO has issued several new legal decisions regarding the application of exceptions to the Antideficiency Act during the partial lapse in appropriations or partial government shutdown that occurred in fiscal year 2019.

• Could you highlight some of the key findings in these legal decisions for the Committee?

GAO has issued five decisions thus far on the fiscal year 2019 lapse in appropriations in which we've concluded that executive branch agencies violated the Antideficiency Act by continuing certain activities during the lapse.

First, we determined that the U.S. Department of Agriculture (USDA) improperly used an appropriation that was available for Supplemental Nutrition Assistance Program benefit payments due on or about January 1. B-331094, Sept. 5, 2019. USDA used the appropriation to cover February payments. *Id.* Because the appropriation was not available for February payments, we also concluded that USDA violated the Antideficiency Act. *Id.*

Second, we concluded that the U.S. Department of the Interior (Interior) violated the purpose statute when it obligated Federal Lands Recreation Enhancement Act fees for expenses that should have been covered by the National Park Service's Operation of the National Park System (ONPS) appropriation. B-330776, Sept. 5, 2019. Because Interior did not have available ONPS appropriations against which to incur obligations for these expenses during the lapse, we also concluded that Interior violated the Antideficiency Act. *Id.*

Third, we concluded that the Federal Deposit Insurance Corporation Office of Inspector General (FDIC OIG) violated the Antideficiency Act when it continued its normal operations during the lapse, even though the FDIC OIG had not yet received its annual appropriations for fiscal year 2019. B-330693, Oct. 8, 2019.

Fourth, we concluded that the U.S. Department of the Treasury (Treasury) violated the Antideficiency Act when the Internal Revenue Service (IRS) incurred obligations to process tax remittances and issue tax refunds during the lapse because Treasury did not have any budget authority to support these activities and there was no exception under the Antideficiency Act that permitted IRS to carry out these activities. B-331093, Oct. 22, 2019. We noted, however, that the IRS can and should take those limited actions necessary to ensure the physical security of tax returns that contained remittances during a lapse in appropriations. *Id.*

Fifth, we determined that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) violated the Antideficiency Act when it incurred obligations to review a Department of Labor final rule and notice of proposed rulemaking during the lapse in appropriations. B-331132, Dec. 19, 2019. We concluded that OMB lacked available budget

authority to incur obligations for these activities and no exception to the Antideficiency Act permitted OMB to incur these obligations. *Id.*

In addition, I have a few other questions about these decisions and about the Antideficiency Act.

• **Could you explain why some of these decisions include discussion about knowing and willful violations of the Antideficiency Act and the applicable criminal penalties? For example, the GAO legal decision, Office of Management and Budget—Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriations, B-331132, Dec 19, 2019, states the following: “With this decision, we will consider any future obligations of this nature in similar circumstances to be a knowing and willful violation of the Antideficiency Act. The Act provides, in that event, that officials responsible for obligations in violation of the Act shall be ‘fined not more than \$5,000, imprisoned for not more than 2 years, or both.’ 31 U.S.C. § 1350.”**

These decisions were not the first time that GAO has warned that a knowing and willful violation of the Antideficiency Act could result in criminal penalties. See, e.g., 71 Comp. Gen. 502 (1992); B-203984, Sept. 30, 1982. We included this warning in some of our decisions regarding the fiscal year 2019 lapse because we were concerned that, in the event of another lapse in appropriations, the Antideficiency Act violations we found would recur. Indeed, some agencies issued public statements disagreeing with our conclusions and asserting that their actions were lawful. Other agencies indicated their disagreement to us.

• **What recommendations do you have to help Congress ensure that Executive Branch agencies do not violate the Antideficiency Act, in the event of a future lapse in appropriations?**

The Antideficiency Act, in its current form, prohibits executive branch agencies from continuing most activities during a lapse in appropriations, and the potential civil and criminal penalties that can be imposed against government officials who violate the act generally deter executive branch officials from violating the act. See 31 U.S.C. §§ 1341, 1349, 1350, 1518, 1519. It would be beneficial for Congress to require additional information from executive branch agencies during a lapse. The requirement to provide additional information imposes discipline in following the law and provides Congress with additional information to enforce the act.

At present, OMB Circular No. A-11 (A-11) requires agencies to develop and maintain plans for an orderly shutdown in the event of a lapse in appropriations. OMB Cir. No. A-11, pt. 4, § 124.2 (Dec. 18, 2019). OMB requires agencies to include the following information in their lapse plans: a summary of significant agency activities that will continue and those that will halt during a lapse; an estimate of time needed to complete the orderly shutdown of agency activities; a statement of the total number of agency employees before implementation of the plan; and a statement of the total number of employees to be retained under the plan and a description of the reason such employees may continue to work. *Id.* While these plans provide a helpful overview of agency activities during a lapse, the plans do not go into great detail about the programs for which agencies incur obligations or the amounts of those obligations.

I would recommend that Congress enact legislation to require executive branch agencies to notify Congress about which specific programs will continue during a lapse, the reasons such programs will continue, and, following the lapse, an accounting, by program, of the obligations that were incurred during the lapse. Having this information would help Congress more quickly

identify where agencies are at risk of violating, or have already violated, the Antideficiency Act, and allow Congress to act more swiftly to prevent or stop these violations.

• Are there legislative improvements that the Congress could make to the Antideficiency Act to address the type of violations that you identified or to protect its power of the purse more generally?

Yes. First, in its current form, the Antideficiency Act requires agencies to notify Congress when agencies identify violations, but is silent on what agencies should do when GAO finds a violation. 31 U.S.C. §§ 1351, 1517(b). I would recommend revising the Antideficiency Act to expressly require agencies to report when GAO finds a violation.

Second, to preclude any possible underreporting of violations, Congress should expressly provide that violations of funding restrictions—whether in an appropriations act or not—are violations of the Antideficiency Act and are required to be reported.

Third, it has long been understood that the act's provisions imposing criminal and civil penalties serve as an important deterrent for government officials and employees. To our knowledge, the Department of Justice has never brought charges against a government official or employee for a criminal violation of the Antideficiency Act. Lest the lack of prosecutions under the Antideficiency Act mitigate the deterrent effect, I would recommend requiring the Department of Justice to annually review reports in GAO's repository and issue a report to Congress, with a copy to GAO, on whether criminal charges have been brought for any of the Antideficiency Act violations reported that year to Congress.